S. HRG. 101-632

ADMINISTRATIVE LAW JUDGE CORPS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 594

A BILL TO ESTABLISH A SPECIALIZED CORPS OF JUDGES NECESSARY FOR CERTAIN FEDERAL PROCEEDINGS REQUIRED TO BE CONDUCTED, AND FOR OTHER PURPOSES

JUNE 13, 1989

Serial No. J-101-22

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ADMINISTRATIVE LAW JUDGE CORPS ACT

TUESDAY, JUNE 13, 1989

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:09 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senators Grassley and Thurmond.

Senator HEFLIN. We will bring the hearing to order. Senator Grassley hasn't gotten here yet, so I will delay making any opening statement.

[The prepared statement of Senator Heflin and a copy of S. 594 follow:]

STATEMENT OF SENATOR HOWELL HEFLIN

BEFORE THE SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

REGARDING S.594, THE ADMINISTRATIVE LAW JUDGE CORPS ACT

JUNE 13, 1989

TODAY, THIS HEARING WILL FOCUS ON LEGISLATION WHICH WILL HAVE A PROFOUND INFLUENCE ON SHAPING THE FUTURE OF THE ADMINISTRATION OF JUSTICE IN THESE UNITED STATES, NAMELY S.594, THE ADMINISTRATIVE LAW JUDGE CORPS ACT. SINCE THE ENACTMENT OF THE ADMINISTRATIVE PROCEDURE ACT ON JUNE 11, 1946, THERE HAVE BEEN GRADUAL CHANGES IN THIS ACT TO MEET THE CHANGING DEMANDS OF OUR MODERN SOCIETY. SPECIFICALLY, THERE HAVE BEEN 15 AMENDMENTS TO THE ACT. I AM PROPOSING ANOTHER CHANGE BECAUSE I BELIEVE THAT REFORM IN THE AREA OF ADMINISTRATIVE LAW IS BOTH TIMELY AND NECESSARY.

ADMINISTRATIVE LAW JUDGES PLAY AN INCREASINGLY LARGE AND MORE CRITICAL ROLE IN THE ADMINISTRATIVE PROCESS. THEY ARE CALLED UPON TO REVIEW AND EVALUATE A WIDE VARIETY OF ISSUES RANGING FROM THE MERITS OF A SOCIAL SECURITY DISABILITY CLAIM TO THE VALIDITY OF EXTENSIVE REGULATIONS GOVERNING THE SECURITIES INDUSTRY. THESE JUDGES OFTEN MAKE IMPORTANT INITIAL DECISIONS WHICH PROFOUNDLY INFLUENCE THE ADMINISTRATION OF JUSTICE. CLEARLY, THESE ADMINISTRATIVE LAW JUDGES (ALJS) ARE A VITAL COG IN THE EXECUTION OF THE LAWS OF THE UNITED STATES.

GIVEN THE IMPORTANCE OF THESE PUBLIC SERVANTS AND THE ISSUES THEY ARE CALLED UPON TO RESOLVE, WE MUST TAKE STEPS TO PROTECT THE INTEGRITY OF THEIR ROLE IN GOVERNMENT. ADMINISTRATIVE LAW JUDGES PROVIDE A UNIQUE SERVICE. THEY MUST BE AWARE OF AND FOLLOW THE LEGITIMATE POLICY DECISIONS DICTATED BY THE EXECUTIVE BRANCH. AT THE SAME TIME, THEY MUST BE IMPARTIAL FACT FINDERS WHO MAKE UNBIASED DECISIONS BASED UPON LAW. IT MAY BE SAID THAT ALJS ARE REQUIRED TO BE THE CONSCIENCE OF AN ADMINISTRATIVE AGENCY, AND ARE OFTEN FORCED TO MAKE DIFFICULT AND SOMETIMES UNPOPULAR DECISIONS. FOR THESE REASONS, THE INDEPENDENCE OF ADMINISTRATIVE LAW JUDGES MUST BE A VITAL CONCERN, AND AS A RESULT, THEIR INDEPENDENCE MUST BE JEALOUSLY GUARDED.

SINCE THE ESTABLISHMENT OF THE ADMINISTRATIVE PROCEDURE ACT IN 1946, AND THE MODERN GENESIS OF THE ROLE OF THE

ADMINISTRATIVE LAW JUDGE, THE RANKS OF ALJS HAVE INCREASED DRAMATICALLY. FURTHER, THESE JUDGES ARE BEING ASKED TO MAKE INCREASINGLY MORE DIFFICULT DECISIONS. RECOGNIZING THESE FACTS, IT IS EASY TO PERCEIVE WHY THERE HAVE BEEN GROWING PROBLEMS IDENTIFYING THE PROPER ROLE THAT ADMINISTRATIVE LAW JUDGES ARE TO PLAY IN THE ADMINISTRATIVE PROCESS. THERE ARE CONTINUING ALLEGATIONS OF ABUSE AND BAD FAITH BEING RAISED AGAINST BOTH AGENCIES AND ALJS. THIS DISTRUST IS DISTURBING AND MANDATES A CONGRESSIONAL RESPONSE TO REMEDY THIS PROBLEM.

I BELIEVE THAT THE ESTABLISHMENT OF AN INDEPENDENT ALJ CORPS IS AN APPROPRIATE RESPONSE TO THIS DILEMMA. I CANNOT TAKE CREDIT FOR THE INITIAL IDEA FOR AN INDEPENDENT CORP. THIS CONCEPT WAS FIRST IMPLEMENTED BY A NUMBER OF STATES WHICH RECOGNIZED THE NEED FOR THIS TYPE OF LEGISLATION. I UNDERSTAND THAT STATES SUCH AS NEW JERSEY AND MINNESOTA HAVE A SUCCESSFUL INDEPENDENT CORPS. MORE IMPORTANTLY, SUCH A PROGRAM WHICH HAS THE ABILITY TO EVOLVE AND ADAPT AS OUR SOCIETY ADVANCES. MY LEGISLATIVE PROPOSAL HAS THESE SAME CHARACTERISTICS, AND IS AN APPROPRIATE LEGISLATIVE RESPONSE.

GENERALLY, THIS BILL WOULD ESTABLISH AN INDEPENDENT CORPS FOR ADMINISTRATIVE LAW JUDGES WHICH WOULD OPERATE UNDER THE EXECUTIVE BRANCH OF GOVERNMENT. THE CORPS WOULD BE GOVERNED BY A CHIEF ADMINISTRATIVE LAW JUDGE. FURTHER, THE CORPS WOULD BE DIVIDED INTO SEVEN DIVISIONS, WITH EACH DIVISION GOVERNED

BY A DIVISION CHIEF ADMINISTRATIVE LAW JUDGE. THE CHIEF AND DIVISION CHIEF ALJS WOULD BE PRESIDENTIAL APPOINTMENTS, BY AND WITH THE ADVISE AND CONSENT OF THE UNITED STATES SENATE.

THE CHIEF AND DIVISION CHIEF ALJS WOULD FORM A COUNCIL. THIS COUNCIL WOULD BE THE POLICYMAKING BODY FOR THE CORPS. THE COUNCIL WOULD HAVE THE AUTHORITY TO ASSIGN JUDGES TO DIVISIONS, APPOINT PERSONS AS ADMINISTRATIVE LAW JUDGES, PRESCRIBE RULES OF PRACTICE AND PROCEDURE FOR THE CORPS, ISSUE APPROPRIATE RULES AND REGULATIONS FOR THE EFFICIENT CONDUCT OF THE CORPS, AND GENERALLY MANAGE ITS DAY-TO-DAY OPERATIONS.

THE BILL PROVIDES EXPLICIT PROTECTIONS FOR ALJS. THE CORPS WOULD CONTINUE TO MAKE APPOINTMENTS OF ADMINISTRATIVE LAW JUDGES FROM A REGISTER OF QUALIFIED CANDIDATES MAINTAINED BY THE OFFICE OF PERSONNEL MANAGEMENT. IN ORDER FOR AN ALJ TO BE INVOLUNTARILY REASSIGNED TO A NEW PERMANENT DUTY STATION, HE OR SHE MUST RECEIVE A WRITTEN EXPLANATION FROM THE COUNCIL STATING THAT SUCH A MOVE IS REQUIRED IN ORDER TO MEET SUBSTANTIAL CHANGES IN WORKLOADS. ALJS WOULD CONTINUE TO HEAR AND ADJUDICATE THE SAME TYPES OF CASES WHICH THEY PRESENTLY DECIDE. FURTHER, ALJS WOULD CONTINUE TO BE ASSIGNED CASES WITHIN THEIR DIVISION ON A ROTATING BASIS, SO FAR AS PRACTICABLE. IN ADDITION, ALJS WOULD BE GIVEN THE EXPLICIT AUTHORITY TO CONTINUE TO ACT AS SPECIAL MASTERS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 53(A). THIS BILL ALSO CONTAINS

PROVISIONS FOR THE REMOVAL AND DISCIPLINE OF ADMINISTRATIVE LAW JUDGES. THE BILL CONTINUES SPECIFIC PROTECTIONS OF ALJS, AND PROVIDES THAT AN ALJ MAY NOT BE REMOVED, SUSPENDED, REPRIMANDED, OR DISCIPLINED EXCEPT FOR MISCONDUCT OR NEGLECT OF DUTY. FURTHER, THE BILL PROVIDES FOR THE REMOVAL OF ALJS DUE TO PHYSICAL OR MENTAL DISABILITY. THESE ARE PROTECTIONS WHICH PROVIDE THE NECESSARY BALANCE OF INDEPENDENCE, TEMPERED WITH PROPER ADMINISTRATIVE CONTROL.

FINALLY, THE BILL CONTAINS PROVISIONS FOR THE SMOOTH TRANSITION OF AUTHORITY, REGARDING ALJS, FROM THE AGENCIES TO THE CORPS. A KEY PROVISION OF THIS TRANSITION IS THAT THE BILL PROVIDES FOR A STUDY AND AN OFFERING OF PROPOSED LEGISLATION WHICH WOULD FURTHER STREAMLINE THE ADMINISTRATIVE DECISION-MAKING PROCESS.

THE PROVISIONS OF THIS BILL ARE DESIGNED TO ADDRESS TWO CRITICAL ISSUES WHICH FACE OUR NATION. FIRST, AN INDEPENDENT CORPS IS VITAL TO THE CONTINUED IMPARTIAL RESOLUTION OF ISSUES AND DECISION OF CASES ARISING UNDER THE ADMINISTRATIVE PROCEDURE ACT. SECOND, THIS BILL STREAMLINES THE FEDERAL BUREAUCRACY IN ORDER TO BETTER MEET THE NEEDS OF THE PEOPLE OF THE UNITED STATES.

SINCE THE LAST CONGRESS, I HAVE LISTENED AND RESPONDED TO PREVIOUS CONCERNS ABOUT THIS BILL. TO THE EXTENT THAT THE

CONCERNS WERE LEGISLATIVELY ADDRESSABLE, SOME CHANGES HAVE BEEN MADE. I RECOGNIZE THAT VIRTUALLY NO ONE WILL FEEL THIS LEGISLATION IS A PERFECT SOLUTION TO THE PROBLEMS FACED BY ADMINISTRATIVE LAW JUDGES, BUT IT IS A RESPONSE TO A GROWING PROBLEM IN OUR ADMINISTRATIVE SYSTEM OF JUSTICE.

I LOOK FORWARD TO TODAY'S HEARING, AND THE TESTIMONY OF ALL THE WITNESSES.

101ST CONGRESS
1ST SESSION

S. 594

To establish a specialized corps of judges necessary for certain federal proceedings required to be conducted, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 15 (legislative day, JANUARY 3), 1989

Mr. HEFLIN (for himself, Mr. SHELBY, Mr. SPECTER, Mr. DECONCINI, Mr. SARBANES, Mr. SANFORD, Mr. PRYOR, Mr. HEINZ, and Mr. METZENBAUM) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To establish a specialized corps of judges necessary for certain federal proceedings required to be conducted, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Law Judge Corps Act".

ESTABLISHMENT OF ADMINISTRATIVE LAW JUDGE CORPS

SEC. 2. (a) Chapter 5 of title 5, United States Code, is amended by adding at the end thereof a new subchapter IV to read as follows:

"SUBCHAPTER IV—ADMINISTRATIVE LAW JUDGE CORPS

"§ 581. Definitions

"For the purposes of this subchapter—

"(1) 'agency' means an authority referred to in section 551(1) of this title;

"(2) 'Corps' means the Administrative Law Judge Corps of the United States established under section 582 of this title;

"(3) 'administrative law judge' means an administrative law judge appointed under section 3105 of this title on or before the effective date of the Administrative Law Judge Corps Act or under section 586 of this title after such effective date;

"(4) 'chief judge' means the chief administrative law judge appointed and serving under section 583 of this title;

"(5) 'Council' means the Council of the Administrative Law Judge Corps established under section 585 of this title;

"(6) 'Board', unless otherwise indicated, means the Complaints Resolution Board established under section 588 of this title; and

"(7) 'division chief judge' means the chief administrative law judge of a division appointed and serving under section 584 of this title.

"§ 582. Establishment; membership

"(a) There is established an Administrative Law Judge Corps consisting of all administrative law judges, in accordance with the provisions of subsection (b). Such Corps shall be located in Washington, D.C.

"(b) An administrative law judge serving as such on the date of the commencement of the operation of the Corps shall be transferred to the Corps as of that date. An administrative law judge who is appointed on or after the date of the commencement of the operation of the Corps shall be a member of the Corps as of the date of such appointment.

"§ 583. Chief administrative law judge

"(a) The chief administrative law judge shall be the chief administrative officer of the Corps and shall be the presiding judge of the Corps. The chief judge shall be appointed by the President, by and with the advice and consent of the Senate. The chief judge must be an administrative law judge who has served as an administrative law judge for at least five years preceding the date of appointment as chief judge. The chief judge shall serve for a term of five years or until a successor is appointed and qualifies to serve, whichever is earlier. A chief judge may be reappointed upon the expiration

of his term, by and with the advice and consent of the Senate.

"(b)(1) If the office of chief judge is vacant, the division chief judge who is senior in length of service as a member of the Council shall serve as acting chief judge until such vacancy is filled.

"(2) If two or more division chief judges have the same length of service as members of the Council, the division chief judge who is senior in length of service as an administrative law judge shall serve as such acting chief judge.

"(c) The chief judge shall, within ninety days after the end of each fiscal year, make a written report to the President and the Congress concerning the business of the Corps during the preceding fiscal year. The report shall include information and recommendations of the Council concerning the future personnel requirements of the Corps. If the Council recommends the appointment of an administrative law judge to add a new position to the Corps, or to fill a vacancy caused by retirement, resignation, removal or death of such judge, the chief judge shall submit information substantiating the need for such appointment.

"(d) After serving as chief judge, such individual may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 588 of this title.

"§ 584. Divisions of the Corps; division chief judges

"(a) Each judge of the Corps shall be assigned to a division by the Council, pursuant to section 585. The assignment of a judge who was an administrative law judge on the date of commencement of the operation of the Corps shall be made after consideration of the areas of specialization in which the judge has served. Each division shall be headed by a division chief judge who shall exercise administrative supervision over such division.

"(b) The divisions of the Corps shall be as follows:

"(1) Division of Communications, Public Utility, and Transportation Regulation.

"(2) Division of Safety and Environmental Regulation.

"(3) Division of Labor.

"(4) Division of Labor Relations.

"(5) Division of Health and Benefits Programs.

"(6) Division of Securities, Commodities, and Trade Regulation.

"(7) Division of General Programs and Grants.

"(c)(1) The division chief judge of each division set forth in subsection (b) shall be appointed by the President, by and with the advice and consent of the Senate.

"(2) To be eligible for appointment as a division chief judge, an individual must have served as an administrative law judge for at least five years and should possess experi-

ence and expertise in the specialty of the division to which such person is an appointee.

"(3) Division chief judges shall be appointed for five-year terms except that of those division chief judges first appointed, the President shall designate two such individuals to be appointed for five-year terms, three for four-year terms, and two for three-year terms.

"(4) Any division chief judge appointed to fill an unexpired term shall be appointed only for the remainder of such predecessor's term, but may be reappointed as provided in paragraph (5).

"(5) Any division chief judge may be reappointed upon the expiration of his term if nominated for such appointment pursuant to the provision of this title.

"(6) Any judge, after serving as division chief judge may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 588 of this title.

"§ 585. Council of the Corps

"(a) The policymaking body of the Corps shall be the Council of the Corps. The chief judge and the division chief judges shall constitute the Council. The chief judge shall preside over the Council. If the chief judge is unable to be present at a meeting of the Council, the division chief judge

who is senior in length of service as a member of such Council shall preside.

"(b) One half of all of the members of the Council shall constitute a quorum for the purpose of transacting business. The affirmative vote by a majority of all the members of the Council shall be required to approve a matter on behalf of the Council. Each member of the Council shall have one vote.

"(c) Meetings of the Council shall be held at least once a month at the call of the chief judge or by the call of one-third of the members of the Council.

"(d) The Council is authorized—

"(1) to assign judges to divisions and transfer or reassign judges from one division to another, subject to the provisions of section 586 of this title;

"(2) to appoint persons as administrative law judges and members of the Corps under section 586 of this title;

"(3) to file charges seeking adverse action against an administrative law judge under section 588 of this title;

"(4) subject to the provisions of subsection (e), to prescribe, after providing an opportunity for notice and comment, the rules of practice and procedure for the conduct of proceedings before the Corps, except that, with respect to a category of proceedings adjudicated

by an agency before the effective date of the Administrative Law Judge Corps Act, the Council may not amend or revise the rules of practice and procedure prescribed by that agency during the two years following such effective date without the approval of that agency, and any amendments or revisions made to such rules shall not effect or be applied to any pending action;

"(5) to issue such rules and regulations as may be appropriate for the efficient conduct of the business of the Corps and the implementation of this subchapter, including the assignment of cases to administrative law judges;

"(6) subject to the civil service and classification laws and regulations, to select, appoint, employ, and fix the compensation of the employees (other than administrative law judges) that such Council deems necessary to carry out the functions, powers, and duties of the Corps and to prescribe the authority and duties of such employees;

"(7) to establish, abolish, alter, consolidate, and maintain such regional, district, and other field offices as are necessary to carry out the functions, powers, and duties of the Corps and to assign and reassign employees to such field offices;

"(8) to procure temporary and intermittent services under section 3109 of this title;

"(9) to enter into, to the extent or in such amounts as are authorized in appropriation Acts, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), contracts, leases, cooperative agreements, or other transactions that may be necessary to conduct the business of the Corps;

"(10) to delegate any of the chief judge's functions or powers with the consent of the chief judge, or whenever the office of such chief judge is vacant, to one or more division chief judges or to other officers or employees of the Corps, and to authorize the redelegation of any of those functions or powers;

"(11) to establish, after consulting with an agency, initial and continuing educational programs to assure that each administrative law judge assigned to hear cases of an agency has the necessary training in the specialized field of law of that agency;

"(12) to make suitable arrangements for continuing judicial education and training of other employees of the Corps, so that the level of expertise in the divisions of the Corps will be maintained and enhanced; and

"(13) to determine all other matters of general policy of the Corps.

"(e) The Council shall select an official seal for the Corps which shall be officially noticed.

"§ 586. Appointment and transfer of administrative law judges

"(a) After the initial establishment of the Corps, the Council shall appoint new or additional judges as may be necessary for the efficient and expeditious conduct of the business of the Corps. Appointments shall be made from a register maintained by the Office of Personnel Management under subchapter I of chapter 33 of this title. Upon request by the chief judge, the Office of Personnel Management shall certify enough names from the top of such register to enable the Council to consider five names for each vacancy. Notwithstanding section 3318 of this title, a vacancy in the Corps may be filled from the highest five eligible individuals available for appointment on the certificate furnished by the Office of Personnel Management.

"(b) A judge of the Corps may not perform or be assigned to perform duties inconsistent with the duties and responsibilities of an administrative law judge.

"(c) A judge of the Corps on the date of commencement of the operation of the Corps may not thereafter be involuntarily reassigned to a new permanent duty station if such

station is beyond commuting distance of the duty station which is the judge's permanent duty station on that date, unless the Council determines and submits a written explanation to the judge stating that such reassignment is required to meet substantial changes in workloads. A judge may be temporarily detailed, once in a 24-month period, to a new duty station at any location, for a period of not more than 120 days.

"§ 587. Jurisdiction

"(a) All types of cases, claims, actions and proceedings heretofore held before administrative law judges shall be referred to the Corps.

"(b) An administrative law judge who is a member of the Corps shall hear and render a decision upon—

"(1) every case of adjudication subject to the provisions of section 554 of this title;

"(2) every case in which hearings are required by law to be held in accordance with section 554 or section 556 of this title; and

"(3) every other case referred to the Corps by an agency or court in which a determination is to be made on the record after an opportunity for a hearing.

"(c) When a case under subsection (b) arises, it shall be referred to the Corps. Under regulations issued by the Council the case shall be assigned to an administrative law judge.

Administrative law judges shall be assigned to cases within their division in rotation, so far as practicable.

"(d) Federal agencies and courts are hereby authorized to refer any appropriate case either—

(1) to the Corps; or

(2) to a specific administrative law judge, with the approval of the majority of the Council, to serve as a special master pursuant to the provisions of Federal Rule 53(a).

"§ 588. Removal and discipline

"(a) Except as provided in subsection (b) of this section—

"(1) an administrative law judge may not be removed, suspended, reprimanded, or disciplined except for misconduct or neglect of duty, but may be removed for physical or mental disability; and

"(2) an action specified in paragraph (1) of this subsection may be taken against an administrative law judge only after the Council has filed a notice of adverse action against the administrative law judge with the Merit Systems Protection Board and the Board has determined, on the record after an opportunity for a hearing before the Board, that there is good cause to take such action.

"(b) Subsection (a) does not apply to an action initiated under section 1206 of this title.

"(c) Under regulations issued by the Council, a Complaints Resolution Board shall be established within the Corps to consider and to recommend appropriate action to be taken when a complaint is made concerning the official conduct of a judge. Such complaint may be made by any interested person, including parties, practitioners, the chief judge, and agencies.

"(d) The Board shall consist of two judges from each division of the Corps who shall be appointed by the Council. The chief judge and the division chief judges may not serve on such Board.

"(e) A complaint of misconduct by an administrative law judge must be made in writing. The complaint shall be filed with the chief judge, or it may be originated by the chief judge on his own motion. The chief judge shall refer the complaint to a panel consisting of three members of the Board selected by the Council, none of whom may be serving in the same division as the administrative law judge who is the subject of the complaint. The administrative law judge who is the subject of the complaint shall be given notice of the complaint and the composition of the panel. The administrative law judge may challenge peremptorily not more than two members of the panel. The Council shall replace a challenged

member with another member of the Board who is eligible to serve on such panel.

"(f) The panel shall inquire into the complaint and shall render a report thereon to the Council. A copy of the report shall be provided concurrently to the administrative law judge who is the subject of the complaint. The report shall be advisory only.

"(g) The proceedings, deliberations, and reports of the Board and the contents of complaints under this section shall be treated as privileged and confidential. Documents considered by the Board and reports of the Board are exempt from disclosure or publication under section 552 of this title. Section 552b of this title does not apply to the Board.".

(b) The table of sections for chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER IV—ADMINISTRATIVE LAW JUDGE CORPS

"Sec.
"581. Definitions.
"582. Establishment; membership.
"583. Chief administrative law judge.
"584. Divisions of the Corps; division chief judges.
"585. Council of the Corps.
"586. Appointment and transfer of administrative law judges.
"587. Jurisdiction.
"588. Removal and discipline.".

AGENCY REVIEW STUDY AND REPORT

SEC. 3. The chief administrative law judge of the Administrative Law Judge Corps of the United States shall

make a study of the various types and levels of agency review to which decisions of administrative law judges are subject. A separate study shall be made for each division of the Corps. The studies shall include monitoring and evaluating data and shall be made in consultation with the division chief judges, the Chairman of the Administrative Conference of the United States, and the agencies that review the decisions of administrative law judges. Not later than two years after the effective date of this Act, the Council shall report to the President and the Congress on the findings and recommendations resulting from the studies. The report shall include recommendations, including recommendations for new legislation, for any reforms that may be appropriate to make review of administrative law judges' decisions more efficient and meaningful and to accord greater finality to such decisions.

TRANSITION AND SAVINGS PROVISIONS

SEC. 4. (a) There are transferred to the administrative law judges of the Administrative Law Judge Corps established by section 582 of title 5, United States Code (as added by section 2 of this Act), all functions performed on the day before the effective date of this Act by the administrative law judges appointed under section 3105 of such title before the effective date of this Act.

(b) With the consent of the agencies concerned, the Administrative Law Judge Corps of the United States may use

the facilities and the services of officers, employees, and other personnel of agencies from which functions and duties are transferred to the Corps for so long as may be needed to facilitate the orderly transfer of those functions and duties under this Act.

(c) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, in connection with the functions, offices, and agencies transferred by this Act, are, subject to section 1531 of title 31, United States Code, correspondingly transferred to the Corps for appropriate allocation.

(d) The transfer of personnel pursuant to subsection (b) of this section shall be without reduction in pay or classification for one year after such transfer.

(e) The Director of the Office of Management and Budget, at such time or times as the Director shall provide, may make such determinations as may be necessary with regard to the functions, offices, agencies, or portions thereof, transferred by this Act, and to make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in

connection with such functions, offices, agencies, or portions thereof, as may be necessary to carry out the provisions of this Act.

(f) All orders, determinations, rules, regulations, certificates, licenses, and privileges which have been issued, made, granted, or allowed to become effective in the exercise of any duties, powers, or functions which are transferred under this Act and are in effect at the time this Act becomes effective shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Administrative Law Judge Corps of the United States or a judge thereof in the exercise of authority vested in the Corps or its members by this Act, by a court of competent jurisdiction, or by operation of law.

(g) Except as provided in subsections (d)(5) and (e) of section 585 of title 5, United States Code, this Act shall not affect any proceeding before any department or agency or component thereof which is pending at the time this Act takes effect. Such a proceeding shall be continued before the Administrative Law Judge Corps of the United States or a judge thereof, or, to the extent the proceeding does not relate to functions so transferred, shall be continued before the agency in which it was pending on the effective date of this Act.

(h) No suit, action, or other proceeding commenced before the effective date of this Act shall abate by reason of the enactment of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 5. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act and subchapter IV of title 5, United States Code (as added by section 2 of this Act).

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 6. Title 5, United States Code, is amended as follows:

(1) Section 573(b) is amended by redesignating paragraphs (4), (5), and (6) as paragraphs (5), (6), and (7), respectively, and inserting a new paragraph (4) to read as follows:

"(4) the chief administrative law judge of the Administrative Law Judge Corps of the United States;".

(2) Section 3105 is amended to read as follows:

"§ 3105. Appointment of administrative law judges

"Administrative law judges shall be appointed by the Council of the Administrative Law Judge Corps pursuant to section 587 of this title.".

(3) Section 3344 and any references to such section are repealed.

(4) The table of sections for chapter 33 is amended by striking out the item relating to section 3344.

(5) The table of contents of this title and of chapter 5 thereof each are amended by inserting after the item relating to section 559 the following:

(6)(A) Subchapter III of chapter 75 of title 5, United States Code, is repealed.

(B) The table of sections at the beginning of chapter 75 of title 5, United States Code, is amended—

(i) by striking out the items relating to subchapter III and section 7521;

(ii) by redesignating "Subchapter IV" and all references to such subchapter as "Subchapter III"; and

(iii) by redesignating "Subchapter V" and all references to such subchapter as "Subchapter IV".

OPERATION OF THE CORPS

SEC. 7. Operation of the Corps shall commence on the date the first chief administrative law judge of the Corps takes office.

CONTRACT DISPUTES ACT

SEC. 8. Nothing in this Act or the amendments made by this Act shall be deemed to affect any agency board established pursuant to the Contract Disputes Act (41 U.S.C. 601), or any other person designated to resolve claims or disputes pursuant to such Act.

EFFECTIVE DATE

SEC. 9. Except as otherwise provided, this Act and the amendments made by this Act shall take effect 60 days after the date of enactment.

Senator HEFLIN. We will go ahead. Since everybody has got a plateful of things to do, we will get started with panel one. Mr. Steven Richards Valentine, Deputy Assistant Attorney General, Department of Justice, is here. Mr. Louis Enoff, who is the Deputy Commissioner for Programs of the Social Security Administration, is here. We will ask them to go ahead, if you will, your written statements will be made part of the record and you are limited to 5 minutes.

Mr. Valentine.

PANEL CONSISTING OF STEVEN RICHARDS VALENTINE, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; AND LOUIS D. ENOFF, DEPUTY COMMISSIONER FOR PROGRAMS, SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES, WASHINGTON, DC, ACCOMPANIED BY EILEEN BRADLEY, ASSOCIATE COMMISSIONER FOR HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES, WASHINGTON, DC.

STATEMENT OF STEVEN RICHARDS VALENTINE

Mr. VALENTINE. Thank you, Mr. Chairman. Before I begin, on a personal note let me say that it is a great honor to be here. I served as a counsel to the committee with Senator John East between 1983 and 1985, so it is a great honor to be back here at the other side of the witness table.

I would like to ask that my full statement be made a part of the record and I will offer a brief summary here this afternoon.

Senator HEFLIN. It will be made part of the record.

Mr. VALENTINE. It seems to me, Mr. Chairman, that the central objective of S. 594 is to ensure both the reality and the appearance of impartiality in administrative adjudications under the Administrative Procedures Act. The Department of Justice certainly shares that goal, but we believe that S. 594 would make, at best, only a very marginal improvement in the public perception of the fairness of such adjudications.

On the other side of the ledger, we are convinced S. 594 would do serious actual harm to the administrative process in a number of critically important respects. The Justice Department therefore strongly opposes enactment of S. 594.

Any public perception—and we are not at all persuaded that there is such a perception—that the current administrative adjudicatory process suffers from a lack of impartiality does not comport with reality.

The current system, established by the APA, provides strong safeguards to assure the impartiality of administrative law judges, whose fairness and even-handedness has not been called into serious question. These safeguards include special arrangements relating to the selection, tenure, and compensation of ALJ's, and a prohibition on the supervision of ALJ's by agency personnel who have investigative or prosecutorial responsibilities.

In our view, the case simply has not been made that agencies do not obey these requirements or that there exists a lack of public confidence in the fairness of the administrative hearing process.

As is set forth in much more detail in my written statement, the Justice Department believes that S. 594 would have a number of very harmful effects on the administrative process.

Perhaps most significantly, S. 594 would result in a critical loss of agency control over the substance of its own decisions. Both the APA, and such cases as the second circuit's recent ruling in *Nash* v. *Bowen*, make clear that the responsibility to make legal policy and administrative decisions continues to reside with the agencies' heads. It is the agencies' heads' policies that are to be applied and not the varying views of many different administrative law judges, each of whom seeks to apply his or her own particular ideas of which policies should be adopted.

In addition, for reasons set forth in more detail in the written statement, enactment of S. 594 would result in the loss of agency flexibility and expedition in implementing regulatory and policy initiatives.

Finally, S. 594 would result in a substantial loss of critical subject matter expertise among administrative law judges. S. 594 would entrust the initial hearing and decision of administrative cases arising under the programs of dozens of agencies to hearing officers in a separate corps, whose exposure to the subject-matter area and operations of a particular agency might well be slight, or even nonexistent.

A change of this sort would take its toll in increased burdens on litigants to educate nonspecialized judges at the administrative level, increased inaccuracy and unpredictability in initial decisions, and the increased burdens on administrative reviewers and reviewing courts resulting from inadequate hearing records and unhelpful or erroneous decisions.

In sum, Mr. Chairman, the Department of Justice strongly opposes the proposal to create the administrative law judge corps. Wholly divorcing administrative law judges from the executive branch agencies whose missions they help carry out would create a quasi-branch within a branch of Government that would needlessly complicate an already complex administrative process.

Thank you, Mr. Chairman, and I would be happy to answer any questions that you might have.

Senator HEFLIN. Thank you for finishing during the yellow light.

[The prepared statement of Mr. Valentine and answers to questions submitted by Senators Heflin and Metzenbaum follow:]

28-172 O - 90 - 2

Department of Justice

STATEMENT

OF

STEVEN RICHARDS VALENTINE
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE

THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICES
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE ADMINISTRATIVE LAW JUDGE CORPS
S. 594

JUNE 13, 1989

TESTIMONY OF
STEVEN RICHARDS VALENTINE
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE
ON SENATE 594
TO ESTABLISH
THE ADMINISTRATIVE LAW JUDGE CORPS
BEFORE THE
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
JUNE 13, 1989

I am pleased to have the opportunity to present the views of the Department of Justice on S. 594, a bill to establish the Administrative Law Judge Corps.

S. 594 represents an improvement, in some respects, upon similar bills that were considered by previous Congresses. For example, S. 594 provides that courts may refer cases to administrative law judges only in the very rare circumstances in which reference to a master is appropriate under Rule 53 of the Federal Rules of Civil Procedure. Earlier such proposals set no standards for the referral of cases or their review.

These relatively minor improvements, however, do not correct the fundamental flaws of the basic proposal to establish the Administrative Law Judge Corps. Creation of the "Corps" would sacrifice the strengths that have been characteristic of *administrative* proceedings and might serve to cripple regulatory programs that have been working well. The legitimate goals of S. 594 could be served better by considering whether particular kinds of issues that now are handled administratively instead should be decided by the Congress or by the courts. Accordingly, the Department of Justice strongly opposes enactment of S. 594.

I. OBJECTIONS TO S. 594 IN GENERAL

A. THE ADVERSE EFFECTS S. 594 WOULD HAVE ON THE ADMINISTRATIVE PROCESS

1. The Administrative Process As A Whole.

The creation of the Administrative Law Judge Corps would result in a system in which the initial task of making a recommended decision would be assigned to a relative generalist, whose work then would be reviewed by subject-matter specialists and non-lawyer experts, followed by yet another round of review by generalists in the courts. We doubt that anyone setting out to design a decision-making system from scratch would do it that way. Such a system should not be developed by haphazard accretion caused by concentrating so hard on the tree of administrative law judge independence that we lose sight of the forest of a functional and efficient administrative process.

S. 594 implicitly recognizes the incongruity of having initial administrative decisions reached by relative generalists, whose work is reviewed by experts, whose review is reviewed by still more generalists. Section 3 of the bill seems to envisage "new legislation" and "reforms" that will ultimately eliminate, or drastically curtail, agency review of administrative law judge decisions. At that point, however, one might as well assign these decisions to courts in the first instance.

Cases generally are assigned in the first instance to administrative agencies for one or both of two reasons. First, Congress may delegate to the agency administrative policy issues that are too time-or resource-intensive for Congress to decide in

an efficient manner. Second, Congress may determine that the disposition of some kinds of policy issues requires technical expertise in a particular subject matter or non-legal discipline.

It may be that, in some instances, the reasons why Congress designated particular agencies to make certain kinds of decisions no longer exist. If given cases originally were assigned to administrative agencies so that they could make policy choices that Congress itself now is prepared to make, then the Congress can eliminate the need for agency adjudications in such areas by reassuming its full policy-making responsibilities. Furthermore, if certain kinds of cases were first assigned to administrative agencies so that their technical expertise could be applied, and if such expertise is no longer necessary, then these cases could be placed within the original jurisdiction of courts. In short, those classes of cases in which the reasons for assigning cases to administrative agencies in the first place no longer exist should be removed from original agency jurisdiction.

Instead, S. 594 proposes to continue making administrative agencies responsible for implementing legislative policy mandates while drastically undermining their power to do so. S. 594 would undermine agency authority on an indiscriminate, across-the-board basis that takes no account of agency-by-agency (or program-by-program) variations in whether there is still a valid reason for cases to be heard in the first instance through an *administrative* process, as opposed to a judicial process.

If there are classes of cases that heretofore have been handled administratively that now should be placed in a judicial process, then Congress should assign those cases to courts. But we urge the Congress not to create a hybrid monstrosity that will not conduct judicial proceedings as well as the judiciary would perform them, and that cannot undertake administrative functions as well as a thoughtfully-designed administrative process.

2. Loss of Agency Control Over the Substance of Its Own Decisions.

Since the volume of cases prevents agency heads in many instances from personally performing every part of agency quasi-adjudicatory functions, they often must rely on administrative law judges to act in their stead and to recommend, and even to make, decisions for the agency. The Administrative Procedure Act ("APA") vests administrative law judges with a degree of independence in carrying out delegated adjudicatory functions, so as to ensure that they will be discharged in a fair and impartial manner. As the APA and such cases as the Second Circuit's recent decision in *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989), make clear, however, the responsibility to make legal, policy, and administrative decisions continues to reside with the agency, or the agency head. It is the agency's, or the agency's head's, policy that is to be applied, and not the varying views of many different administrative law judges, each of whom seeks to apply

his or her own particular ideas of which policies should be adopted.[1]

The Department of Justice is concerned that the separation of administrative law judges from the agencies whose cases they hear would tend to cloud these well-established principles of administrative law and would produce increased problems of inconsistency between administrative law judges' decisions and the policies of the responsible agency head. The reality of this concern is illustrated, for example, by the case of *D'Amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983). In *D'Amico*, administrative law judges in the Social Security Administration brought suit to enjoin the implementation of agency policy limiting the liability of social security beneficiaries for the

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[1] *See generally Attorney General's Manual on the Administrative Procedure Act* 14-15, 55, 84 (Dept. of Justice 1947); *Legislative History of the Administrative Procedure Act*, S. Doc. No. 248, 79th Cong., 2d Sess. 210-11, 229, 262-63, 272-73 (1946); Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies* 51, 53, 57 (1941); *Administrative Procedure Act*: Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 161-67 (1965) (testimony of Kenneth Culp Davis); *D'Amico v. Schweiker*, 698 F.2d 903 (7th Cir. 1983); *Ass'n of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984). As we observed in an earlier communication to Congress: "The head of the agency may establish agency 'policy' and so control the exercise of its administrative law judges' discretion by regulation (both legislative and interpretative), guidelines and instructions.... [T]o the extent that the statute [administered by an agency] provides administrative discretion to choose alternative courses of action, that discretion resides in the head of the agency.... [T]he fundamental policy choices, which may, of course, affect the outcome of any case, are determined by the agency head." Letter of Assistant Attorney General Robert A. McConnell to Honorable Charles E. Grassley, Chairman, Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary (May 15, 1984).

repayment of improperly paid benefits. While the court in that case held that the administrative law judges had no standing to challenge the policy, we believe that it is inevitable that instances of resistance to, and disregard of, agency policies would increase under S. 594 if it is enacted into law.

One predictable consequence of this change would be an increase in appeals at the administrative level, occasioned by divergences on matters of law and policy between administrative law judges and reviewing authorities within the agency involved. A broader concern is the adverse effects of such a change on the public accountability of government. S. 594 would tend to increase the *de facto* policy-making role of adjudicatory officers who are insulated from political and public accountability. It would do so at the expense of agency heads, who are formally vested with policy-making responsibilities and the exercise of administrative discretion by law, and who ultimately are accountable to the public through periodic appointment and confirmation by elected officials.

3. Loss of Agency Flexibility and Expedition in Implementing Regulatory and Policy Initiatives.

As previously noted, in many agencies, the volume of cases prevents the agency head from carrying out the agency's quasi-adjudicatory functions directly, thus necessitating reliance on administrative law judges who act for the agency head. In addition to the accountability problems noted above, the termination of administrative control of agency heads over

administrative judges who issue decisions for the agency head may create substantial obstacles to the timely implementation of programs by the officers and agencies with the programmatic responsibilities. Many agencies frequently must act on an emergency basis in particular cases, or have policy initiatives that they want to implement expeditiously through the bringing and adjudication of cases. In such situations, control over the time and dockets of the officers who hear and initially decide such cases is of great importance. By divesting agency heads of their existing administrative authority over administrative law judges, S. 594 would make the timing and decision of administrative cases less responsive to the priorities of the agencies with substantive programmatic responsibilities.

In addition, S. 594 might be read to eliminate the existing authority of an agency head to hold the initial hearing himself (or, in multi-member agencies, to assign the hearing and initial decisions to one of the members). 5 U.S.C. § 556(b). While the bill would not expressly repeal this authority, its provision (proposed 5 U.S.C. § 587) that all cases in which hearings are to be held in accordance with 5 U.S.C. § 554 or § 556 must be assigned to administrative law judges might be read as an implicit repeal. If so, the bill would seriously reduce an agency's flexibility and its ability to expedite time-sensitive and other cases of particular importance by holding the initial hearing itself.

We see no reason why Congress should determine in advance that hearings on safety issues that may involve life-and-death questions or hearings on economic issues in which millions of dollars might be at stake *never* can be sufficiently urgent or important that an agency head himself (or a multi-member agency) should be able to hear the issues in the first instance. Agencies ought not to be placed in a procedural straight jacket that would prevent them from deciding whether a case is suitable for initial hearing by an agency or by an administrative law judge.

4. The Loss of Expertise.

Under S. 594, administrative law judges would serve in broad subject-matter divisions within the Corps. The resulting loss of the high degree of expertise produced by the current system of agency-based administrative proceedings is yet another of the most serious disadvantages of the proposed Administrative Law Judge Corps.

Proponents of the Corps proposal tend to minimize the importance of expertise in administrative adjudication. They have frequently drawn a comparison between the proposed Corps and the generalist character of the Article III judiciary. District and circuit judges may hear almost any kind of Federal case. They become adept at assimilating new background information and legal knowledge as the need arises in the particular cases that come before them. It is argued that administrative law judges

could function with equal effectiveness as generalists whose caseloads would include cases drawn from a variety of agencies and programs.

We find this argument to be most unpersuasive. At the outset, there obviously are significant departures from adjudication by generalist judges even in the courts. In a number of subject-matter areas, Congress has created courts whose jurisdiction is limited to administrative cases of a single kind or a limited number of kinds. These include, of course, the Tax Court, the Claims Court, and the Court of International Trade. As we have noted, moreover, for those programs in which administrative expertise no longer is necessary, the solution similarly should be to assign cases under those programs to courts, not to create a Corps that will hear cases even in areas in which highly specialized expertise continues to be necessary.

It is the historic premise of our system of administrative law, after all, that expertise in specialized administrative areas is essential to prompt and informed decisions. The experience with generalist judges in the courts tends to confirm this premise rather than to call it into question. In fact, the judges of reviewing courts at times have expressed dismay at the difficulties they face in dealing with highly technical or esoteric administrative matters.[2] Moreover, a judge who receives

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[2] See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 633, 641 (D.C. Cir. 1973); id. at 650-52 (separate opinion of Bazelon, C.J.).

administrative cases on review generally has the benefit of a decision and a record that has been produced by an expert administrative law judge at the initial hearing of the case, as well as any additional opinions and analyses produced in the course of subsequent review within the agency involved. The reviewing court's function in such cases is also normally a limited one, extending only to review for errors of law and the sufficiency of the evidence to support the result that has been reached under a deferential review standard.

S. 594, on the other hand, would entrust the initial hearing and decision of administrative cases arising under the programs of dozens of agencies to hearing officers in a separate Corps whose exposure to the subject matter area and operations of a particular agency could be slight or even nonexistent. A change of this sort would take its toll in increased burdens on litigants to "educate" non-specialized judges at the administrative level, increased inaccuracy and unpredictability in initial decisions, and the increased burdens on administrative reviewers and reviewing courts resulting from inadequate hearing records and unhelpful or erroneous initial decisions.

B. SUPPOSED BENEFITS OF S. 594

1. Protection of ALJ Impartiality.

A frequently emphasized objective of the Administrative Law Judge Corps proposal is ensuring both the reality and appearance of impartiality in administrative adjudications. That is indeed an important objective.

The current system, however, provides strong safeguards to assure the impartiality of administrative law judges, whose fairness and even-handedness has not been called into serious question. *See generally* Scalia, *The ALJ Fiasco-A Reprise*, 47 U. Chi. L. Rev. 57 (1979). These include, for example, special arrangements relating to the selection, tenure and compensation of administrative law judges, a prohibition of supervision of administrative law judges by agency personnel with investigative or prosecuting functions, and a prohibition of participation in an administrative law judge's decision by agency personnel performing investigative or prosecuting functions in a case except as witnesses or counsel in public proceedings. *See generally* 5 U.S.C. §§ 554, 556-57, 3105, 5372, 7521. There has been little or no indication either that agencies do not obey these requirements or that there exists a lack of public confidence in the fairness of the administrative hearing process such that administrative law judges should be separated from agencies that currently employ them.

While there have been *allegations* of the failure to observe these safeguards in a few agencies, such mere assertions are not

always well-founded. Unfortunately, the finding that an assertion is baseless often never gets the publicity of, or catches up with, the more publicized or sensationalized initial assertions. For example, in *Nash v. Califano*, 613 F. 2d 10 (2d Cir. 1980), has been cited often, even though it held only that the mere allegations involved were sufficient to confer standing upon an administrative law judge to contend that the agency was violating his rights under the Administrative Procedure Act. Less well-known is that, on the merits, after a lengthy pre-trial discovery period, and after a four-day trial supplemented by numerous depositions, the Second Circuit subsequently upheld the Social Security Administration's actions with respect to administrative law judges as "entirely within the Secretary's discretion to adopt reasonable administrative measures in order to improve the decisionmaking process." *Nash v. Bowen*, 869 F.2d 675, 681 (2d Cir. 1989).

2. Efficiency.

We have discussed above how the reduced specialization that would flow from S. 594 is likely to make the administrative system less efficient in utilizing administrative law judge expertise. Proponents of the Corps proposal, on the other hand, have suggested that it would improve the efficiency of administrative adjudication. First, they have stated that economies would be realized through the consolidation of support services and systems that would be made possible by gathering all

administrative law judges into a single agency. While some existing duplication might be eliminated in this manner, however, it may be more likely that economies that are currently realized through the sharing of facilities and support services by administrative law judges and their employing agencies would be lost.

Consider just a few examples. Administrative law judges may be only a small percentage of agency personnel who use and need an agency's specialized subject-matter library. The agency will obviously continue to need the library. The result thus may be that the Corps will need to duplicate many materials in the libraries that the agencies themselves still will need. Similarly, the need for both the agency and the judges to have access to case records may increase, rather than decrease, the amount of paper and space devoted to filing and docketing cases.

Thus, S. 594 would be likely to impose additional costs on the administrative system. Proponents argue that other costs would be reduced. But one thing seems reasonably clear. Estimates that the Administrative Law Judge Corps, on balance, actually would save any significant amount of money are, at best, speculative. If there were strong reasons for enacting S. 594, perhaps the risk of incurring added costs would be of less significance. But the mere possibility of achieving an uncertain amount of savings does not, in our view, justify adopting a badly flawed proposal.

Proponents of S. 594 have argued that a unified Corps would be superior to the current system in matching the availability of administrative law judge manpower to shifts in caseloads among the various agencies. Temporary adjustments to meet fluctuations in caseloads, however, already can be effected under an agency-based system of adjudication through interagency assignments. Under the approach of S. 594, the general availability of administrative judges to hear cases would depend on decisions of the Corps' administrators, rather than on the agencies' own assessments of the needs of their programs. For this reason, we doubt that the assignment of judges by the Corps would result in greater congruence with the needs of the various agencies.

II. OBJECTION TO S. 594 IN PARTICULAR

As we have explained above, the concept of using an Administrative Law Judge Corps to hear the wide variety of issues and cases arising in Federal agencies is one that is inherently unsound.

While the manner in which S. 594 is formulated is an improvement over similar recent bills, the basic proposal remains flawed. Further, S. 594 would limit the President's authority in making appointments to the Council of the Corps in a manner that cannot be reconciled with the Constitution.

APPOINTMENT OF COUNCIL MEMBERS

Proposed 5 U.S.C. § 583(a) specifies that the Chief Administrative Law Judge (Chief Judge), who is to be appointed by

the President, with the advice and consent of the Senate, "must be an [administrative law judge] who has served as an [administrative law judge] for at least five years preceding the date of appointment as chief judge." Proposed 5 U.S.C. § 584(c)(2) specifies that the Corps Division Chief Judges (Division Chiefs), who are also to be presidential appointees subject to Senate confirmation, "must have served as [administrative law judges] for at least five years and should possess experience and expertise in the specialty of the division to which such person is an appointee."

The Appointments Clause of the Constitution (Art. II, Sec. 2, cl. 2) requires that "officers of the United States," *i.e.*, those persons who exercise "significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), must be appointed by one of two means. An officer of the United States may be appointed by the President, by and with the advice and consent of the Senate, or the appointment of "inferior" officers in the Executive Branch may be vested by Congress in the President alone or in the heads of the Executive Branch departments. Since the Corps Chief Judge and Division Chiefs together constitute the Corps' Council, which would serve as the Corps' policymaking body, and individually each would exercise substantial administrative authority within the agency, it is clear that they would exercise significant authority under the laws of the United States. S. 594 would grant the President

the authority, by and with the advice and consent of the Senate, to appoint these officials.

However, S. 594's additional requirements -- that, in order to be eligible for appointment by the President, candidates must be administrative law judges and must have specified experience and expertise -- impermissibly infringe on the President's constitutional authority to appoint the officers that he deems to be suitable for the offices that Congress creates. In particular, we observe that the requirement that candidates must be administrative law judges already limits the President's choice to a fixed and rather small number of people. The only check that the text of the Constitution places on the President's power of appointment for such "principal officers" is the advice and consent of the Senate.[3] U.S. Const. Art. II, Sec. 2.

In summary, Mr. Chairman, the Department of Justice strongly opposes the proposal to create the Administrative Law Judge Corps. Wholly divorcing administrative law judges from the Executive Branch agencies whose missions they help carry out would create a quasi-branch-within-a-branch of government that

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[3] Although the Supreme Court has recognized that statutory qualification requirements may be imposed for "inferior officers," *United States v. Perkins*, 116 U.S. 483 (1886), such officers are clearly distinguishable for Appointments Clause purposes from "principal officers." Congress as a whole is permitted to influence the selection of the inferior officers through its authority to "vest appointments" as it "thinks proper," U.S. Const. Art. 2, Sec. 2, while the only Congressional check on the qualifications of principal officers is the advice and consent of the Senate.

would needlessly complicate an already complex administrative process. Our reservations about S. 594 are sufficiently serious that the Department of Justice would recommend the veto of S. 594 by the President if it were to be enacted by the Congress.

I appreciate the opportunity to present the views of the Department of Justice and would be pleased to answer questions.

U.S. Department of Justice
Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

JUN 29 1989

Honorable Howell Heflin
Chairman
Subcommittee on Courts and
Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Mr. Chairman:

Thank you for providing me the opportunity to present the views of the Department of Justice ("Department") at the June 13 hearing on S. 594, which would establish an Administrative Law Judge Corps ("ALJ Corps" or "Corps") as a new Executive Branch agency. I also appreciate having this opportunity to respond to the written questions from you and Senator Metzenbaum that you sent to the Department with your June 14 letter. I am replying to both sets of questions by means of this letter.

Chairman Heflin's Questions:

Question One:

You express concern that the Department's prepared statement advocates relinquishing executive control over issues now handled administratively. The part of our prepared statement to which your comment refers embodies a recognition that not every governmental decision should be made by the Executive Branch. At one extreme, some choices are so crucial and fundamental that they should, if possible, be made by the Congress (and the President) in the legislative process. At the other extreme, decisions for which an independent decision-maker not subject to political accountability is most appropriate can be assigned to the Judicial Branch. But, for the large middle-range of decisions that involve executing the law through an administrative process, the Department believes that consigning decisions to "Executive Branch" officers who are not directly answerable to either of the political branches -- a result that S. 594 would encourage -- is inappropriate and unwise.

The Department does not oppose S. 594 because we endorse reduced Executive Branch responsibility for administrative proceedings. Rather, the Department is concerned that S. 594 will diminish executive control where it is appropriate, indeed essential. We do not understand this to be S. 594's intended purpose. For the reasons stated in our prepared statement, however, the Department believes that a principal effect of S. 594 would be to reduce both the authority and political accountability of the Executive Branch for many kinds of decisions.

Your question states that the purpose of S. 594 is "to create an atmosphere in which [ALJs] can do their work . . . but not fear reprisals for making an unpopular decision." For the reasons explained in my prepared statement, I disagree with the premise that underlies both your question and S. 594: that the Administrative Procedure Act ("APA") does not provide an atmosphere in which ALJs can perform their duties independently and without fear of reprisals. If even greater independence than the APA already provides is truly necessary for some kinds of decisions, it may be that they should be handled by the judiciary rather than through the administrative process. Alternatives that focus on those kinds of decisions might be a better starting place for discussion rather than a proposal that makes a wholesale change in the administrative process for all kinds of decisions, regardless of their continued suitability for a truly administrative decision-making process.

Question Two:

You ask how the Department perceives the role of ALJs in following federal judicial precedent, and in addressing situations where agency policy conflicts with that precedent. To begin, we do not agree with your statement that ALJs and district judges, in many ways, are "functionally" comparable. In any event, the fact remains that they serve in different branches of the government.

A district judge is a member of a hierarchy in which there are superior courts. District judges owe a duty of obedience to those courts and should strive to make decisions in accordance with their precedents. However, a district judge is not a surrogate for any other official; the district judge possesses all of his or her judicial power by right of nomination by the President and, by and with the advice and consent of the Senate, appointment to the office.

In contrast, an ALJ makes only a recommended or initial decision as a surrogate for the agency head himself, who cannot hear personally all the cases in which he is to make decisions. An ALJ therefore should strive to reach the same conclusion that the agency head would reach. All would agree that a district

judge should not premise a decision on his view that the controlling circuit court or the Supreme Court had misconstrued a law. For analogous reasons, an ALJ should not reach a decision based on his view that the agency head had misconstrued a law. Because ALJs are "stand-ins" for the agency head, they are bound to follow his policies and legal interpretations rather than their own individual perceptions and interpretations of the holdings of some federal courts.[1]

A given agency, of course, cannot by itself "coerce" or take disciplinary action against an ALJ for refusing to follow its decisions. The disciplinary authority lies outside the hands of the hierarchical superior--in the Office of Personnel Management ("OPM") (with review by the courts) in the case of ALJs. As a practical matter, the duty to act as a subordinate, rather than as a principal, is enforceable primarily through the subordinate's recognition of his duty.

Question Three:

As your letter indicates, S. 594 contemplates dividing the ALJ Corps into seven specific subject-matter divisions. These divisions generally are broader in subject matter than the current responsibilities of any one agency, and hence dilute expertise. Moreover, under S. 594, the transfer of ALJs from division to division essentially would be unconstrained. Such transfer authority would be placed in the discretion of an agency (the Corps) whose institutional viewpoint is likely to downplay the need for expertise. Thus, we would expect inter-divisional transfers to be so frequent as to diminish significantly even the reduced expertise that relatively stable divisions would cause.

You ask whether agencies currently provide for continuing education and training of ALJs. Our understanding is that agencies do provide such education and training. Of course, the nature and amount of such efforts vary among agencies. And, like all training, it is subject to the availability of resources.

It is important to emphasize that the Administration does not oppose S. 594 on the basis that it would provide for continuing education. Legislation to provide for such training

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[1] The question of whether agency heads may decline to follow the views of courts is one that has been recently addressed by the Civil Division and by the Solicitor General's office. Letters to Administrative Conference of the United States from Assistant Attorney General Bolton (May 6, 1988), and Deputy Solicitor General Merrill and Assistant to the Solicitor General Kneedler (May 9, 1988). I enclose copies of this correspondence expressing more fully this Department's views on this issue.

obviously could be enacted, if necessary, regardless of whether an Administrative Law Judge Corps were established.

In addition, you ask how S. 594 raises "lost expertise" concerns if the existing "loan program" does not. We believe that the "loan program" does raise the expertise problem, but to a lesser extent than does S. 594. Moreover, the existing loan program allows the borrowing agency to decide to what extent the loss of expertise, which obviously is of varying weight depending on the kind of case, is outweighed in the particular instance by the need for expedition. The borrowing agency would have no such control under S. 594.

In addition, the agency that "lends" the ALJs under the loan program does so only after assessing its own needs. Allowing a "Corps" unilaterally to determine that one agency's needs are more pressing than another's, and that ALJs should be diverted from one area to another, would run the serious risk that such assignments may not be sufficiently informed by agency priorities. Rather, such decisions often could result from the internal priorities of the Corps. To the extent that different Executive Branch agencies have competing needs for the use of finite resources, the responsibility for deciding the relative priority of various tasks of the Executive Branch should remain a matter for decision between those agencies in the best position to assess those priorities on behalf of the Executive Branch.

Turning to specifics, we have requested information from OPM regarding its administration of the ALJ loan program. OPM has advised us that only about one dozen ALJs and approximately 300 cases annually are involved in this program. OPM attempts to select ALJs for loan who have some experience with the types of cases the borrowing agency has to be heard. Thus, under the current loan system, nearly all ALJs have specialized expertise in the borrowing agency's programs for which they hear cases.

In contrast, under S. 594's centralized ALJ Corps, only those ALJs from the Department of Labor and the Social Security Administration ("SSA") would be assigned to divisions of their own. The remaining 28 agencies -- currently employing some 230 ALJs -- would see their ALJs merged into one of the remaining five Corps divisions. ALJs in these five divisions no longer would specialize in the work of a particular agency. Rather, they would have numerous cases from several agencies assigned to them in rotation. Thus, the expertise of ALJs for these 28 agencies would be diluted substantially. Even in their own divisions, moreover, ALJs formerly with Labor and SSA would have less direct contact with their current program agencies. Thus, they, too, invariably would suffer a dilution of expertise.

Question Four:

Temporary fluctuations in agency workloads are being met through the temporary interagency assignments of ALJs. For example, we understand that the National Labor Relations Board, the Interstate Commerce Commission, and the Federal Trade Commission currently are able to lend ALJs to other agencies. OPM has selected these agencies' ALJs to hear a number of cases for the Executive Office for Immigration Review at the Justice Department and, we are advised, for the various banking agencies. OPM has advised the Department that it perceives that, in general, agencies believe that they have sufficient ALJs to hear their cases. Moreover, we do not understand the agencies to believe that they have substantial backlogs.

Senator Metzenbaum's Questions:

Question One:

Senator Metzenbaum also asks us to elaborate on the kinds of issues that the Congress or the courts might be in a position to decide better than ALJs in administrative proceedings. Our response to Senator Heflin's first question elaborates on the general kinds of decisions that should be made by the Congress or courts. As to which particular categories of decisions now assigned to agencies, if any, should be made instead by Congress and the courts, we believe that these issues would be addressed more usefully by the subject-matter agencies and subject-matter committees concerned. Our point was an overall structural one, not a particularized canvass of programs that are conducted by other agencies.

Question Two:

Senator Metzenbaum asked whether we have received, or are aware of, complaints of unfair or impartial treatment in administrative proceedings. The Justice Department is not a centralized repository of such complaints. Obviously, there are going to be complaints about the fairness of particular judges or hearings in administrative systems that, combined, decide many more cases than the federal courts. OPM advises the Justice Department that its perception is that such complaints about unfairness and perceived bias occur only very rarely. We note that any such complaints are properly raised on the record in the course of an individual agency administrative proceeding.

Allegations of unfair or biased treatment also can be the subject of a collateral judicial challenge. An illustration is *Chocallo v. Bureau of Hearings and Appeals*, 548 F. Supp. 1349 (E.D. Pa. 1982), *aff'd without opinion*, 716 F.2d 889 (3d Cir.), *cert. denied*, 104 S. Ct. 426 (1983), which involved an instance

in which legal aid personnel complained of the manner in which an ALJ handled some social security cases. The case resulted in the eventual removal of the ALJ by the Office of Personnel Management.

I hope that these answers to your questions will assist the Subcommittee in its further deliberations on S. 594. Please do not hesitate to contact us if the Department can provide any further assistance on this or any other matter.

Very truly yours,

Steven Richards Valentine

Steven Richards Valentine
Deputy Assistant Attorney General

Enclosures

cc: Honorable Howard M. Metzenbaum

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY - 6 1988

Honorable Marshall J. Breger
Chairman
Administrative Conference
of the United States
2120 L Street, N.W., Suite 500
Washington, D.C. 20037

Attn: Mary Candace Fowler
Staff Attorney

Dear Mr. Breger:

This is in response to your letter of March 24, 1988 inviting comments on the preliminary draft of "Nonacquiescence by Federal Administrative Agencies" ("Draft") by Professors Samuel Estreicher and Richard L. Revesz.[1]

The Draft's survey of agency practices shows that a wide variety of federal agencies with different missions and in different administrations have thought it appropriate to non-acquiesce in at least some circumstances. In general, the Draft also describes extensively and well both the considerations that sometimes warrant nonacquiescence and the countervailing considerations. As might be expected of comments that cannot be as wide ranging as the Draft, this letter will focus on significant points of the Draft that we believe might be improved. While we do not mean to imply agreement with every line of the Draft on which we do not comment, our focus on particular areas of disagreement is not meant to deny the considerable overall value of the Draft. Its careful and detailed analysis should help both agencies and courts get beyond the sometimes merely reflexive accusations and misunderstandings that have plagued their relationship on this issue.

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[1] We are also in receipt of the Committee on Judicial Review's tentative draft Recommendation 88 - (4/11/88) which we comment on separately at the end of this letter.

1. Types of Nonacquiescence--Regulations and Non-acquiescence. The Draft correctly observes that significant differences among different types of agency actions are sometimes confused through use of the single label of nonacquiescence. We would like to add to the discussion consideration of two other factors that may be significant in determining what kind of acquiescence, if any, is involved.

The first factor is whether the agency reacts to an adverse decision by exercising rulemaking authority assigned to it by Congress. When a court interprets a statute to have one meaning, and Congress later amends the statute to provide otherwise, few would characterize Congress as either nonacquiescing or flouting judicial authority. While such congressional reaction is sometimes characterized as "overruling" the judicial decision, that characterization also misses the difference in the types of authority exercised by the legislative and judicial branches. While the courts generally are confined to interpreting what a prior Congress meant, Congress can always make new legislative judgments that are (within the limits of the Constitution) effective regardless of whether they depart from prior legislative judgments and regardless of whether the courts did or did not correctly interpret the sometimes murky intent of a prior Congress. See, e.g., Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948).

In many instances, Congress has assigned to an agency the authority to elucidate provisions of a statute through regulation (even though Congress could have done so itself through more detailed legislation). See, e.g., Chevron U.S.A. v. NRDC, 467 U.S. 837, 842-45 (1984); Batterton v. Francis, 432 U.S. 416, 425 (1977). Just as Congress may quite legitimately change the result reached by judicial interpretation of prior statutes by exercising legislative authority, in many circumstances agencies that have rulemaking authority may also do so. Such administrative power is no more destroyed by the happenstance that a statute is first construed by a court than is Congress' power to legislate negated by the existence of common law or decisions construing prior statutes. As the District of Columbia Circuit held in Federation of Homemakers v. Schmidt, 539 F.2d 740 (D.C. Cir. 1976):

> In its explanation of the argument that the regulation contravenes the statute, the Federation of Homemakers relies on many cases in which judges have discussed, in both holdings and dicta, the characteristics of imitation food. . . . While it is true that these judicial definitions may be reasonable

> ones, we do not believe that they prevent the promulgation of an equally reasonable definition by the agency charged with administering the Act. Congress chose not to define the parameters of its imitation label requirements; our deference to the enforcing agency's interpretation limits our review to determining only whether the regulation violates the language of the statute or is arbitrary or capricious.

539 F.2d at 743 (footnote omitted). Accord, Gerace v. Grocery Manufacturers of America, 474 U.S 801, aff'g mem. 755 F.2d 993, 1001 (2d Cir. 1985) ("We could scarcely improve on the D.C. Circuit's perspicacious decision in Federation of Homemakers").

For example, where courts have been forced to address issues that an agency could have, but had not yet, addressed by regulation, a subsequent agency exercise of its rulemaking authority on the point would not seem to be properly thought of as nonacquiescence, even if the agency's view differs from the result the court had reached in the vacuum left by the agency's prior silence on the point. See note 8, infra.[2] Similarly, where the courts had reached their reading of a statute at least partially in reliance on the agency's interpretation, rulemaking or other proceedings in which the agency reaches a different conclusion ought not be viewed as nonacquiescence, since the change in the agency's view removes one ground on which the courts relied.[3] (In either instance, a court of appeals decision, while not a per

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[2] This situation was arguably presented by the Social Security Administration's grid regulations, which relieved the agency of the need to rely on the testimony of vocational experts in many cases. Heckler v. Campbell, 461 U.S. 458, 461 (1983). The requirement for such testimony had resulted from the agency's acquiescence in court of appeals precedent requiring such testimony. See J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, & M. Carrow, Social Security Hearings and Appeals 78-79, 141-42 (1978). The reactions of the courts of appeals to the agency's attempt to relieve itself of the caselaw-imposed requirement varied. Compare Santise v. Schweiker, 676 F.2d 925, 937 (3d Cir. 1982) and Kirk v. Sec'y of HHS, 667 F.2d 524, 530 (6th Cir. 1981) with Campbell v. Sec'y of HHS, 665 F.2d 48, 53-54 (2d Cir. 1981), rev'd 461 U.S. 458 (1983)

[3] Gerace and Federation of Homemakers seem to illustrate this proposition.

as bar to the regulation or other administrative action, may well be an important datum for the agency to consider.)[4]

The other factor that often complicates discussions of nonacquiescence is the perhaps understandable desire of advocates for those opposing agency policies to expand the conduct given the opprobrious label nonacquiescence to cases in which a "conflict" between the court and agency is not one of policy or law but is, rather, a difference merely of particular result or language. That an agency misapplied the law in one or several particular cases does not mean that it nonacquiesces in the law any more than a district judge nonacquiesces by misapplying the law to particular facts. Nor can agencies be expected constantly to rewrite their regulations to mimic verbatim every minor shift in the verbal formulations (often dictum) through which different courts restate unchanged law or policy.

2. The Procedure of Nonacquiescing. The Draft understandably addresses at considerable length the decisional process agencies should use to attempt to avoid inadvertent failure to appreciate the meaning of court of appeals decisions, and to assure that, in those instances where the meaning of a court of appeals decision is comprehensible and comprehended, the agency nonacquiesces only after appropriate officials have given due and respectful consideration to the views of the court of appeals. As we have noted, there may be some instances where the agency should at least consider using the even greater procedural safeguards of rulemaking or rulemaking-like procedures. However,

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[4] Even if, or even when, adoption of a new rule is viewed as nonacquiescence, agency use of a rulemaking or similar procedure is a factor that ought to support the reasonableness of its nonacquiescence, as such a procedure should assure that the agency has not just unthinkingly adhered to its own preferences, but that high-level officials have taken a hard look at the views both of the court of appeals and of interested parties. We do not, however, suggest that agencies should be inflexibly required to use rulemaking or similar proceedings in order to nonacquiesce. Considerations of time, the nature of the dispute, and limitations on agency authority may be among the factors that could make a regulatory solution inappropriate in many cases. Cf. Draft at 128-29. Nevertheless, agencies should understand that court of appeals decisions do not generally preclude subsequent exercises of administrative rulemaking or other regulatory authority, and ought to be aware of the possibility of exercising such authority in order to avoid a confrontation over nonacquiescence.

because agency structures differ, different decision-making structures may be appropriate in some agencies.[5]

In designing a process to assure that agencies react thoughtfully to appellate decisions, agencies should take into account not only the substantial benefits of such a process, which the Draft describes, but also the costs. These may also be substantial since "[t]he task of defining conflicts between legal principles is not a mechanical or wholly objective one." Draft at 20.[6] As the Draft observes (at 20), the task requires a combination of skill in the art of interpreting precedent and knowledge of the agency's policies. Agency personnel who combine both types of knowledge to a sufficient degree may often be a very rare, or even non-existent, resource. See D. Horowitz, The

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[5] For example, in social security cases, lower-level decisions are made by non-lawyers who work for state agencies that, absent instruction, might adopt many different constructions of court of appeals precedent. Even at the ALJ level, each ALJ does not answer to any other, is burdened with a large number of cases, in some cases does not have access to claimants' briefs to help him spot conflicts, and in no case has access to agency briefs that might help him decide whether an alleged conflict in fact exists. The number of cases the Appeals Council can review is limited, and, because of the absence of agency counsel at the ALJ level, the agency has virtually no means short of Appeals Council review to determine whether an ALJ has departed from either agency or court policy. Near the opposite extreme to the Social Security Administration, one might imagine an agency where action is initiated only in a single, central and hierarchical office of lawyers, a General Counsel's office, for example; where the cases are few in number but intensively briefed by the parties; where the vertical equity issues are relatively less pressing; and where the agency heads are likely to review the case, or at least to review detailed briefs arguing for review.

[6] In virtually any case, both parties can and do make fairly plausible arguments that at least one aspect of their opponent's position is inconsistent with some controlling precedent. Almost any randomly chosen non-unanimous Supreme Court decision shows one or more justices disagreeing with each other about which of their opinions it is that fails to follow the Court's own prior decisions. So too, agencies cannot be expected even under the best of circumstances infallibly to predict what agency policies will be found inconsistent with appellate precedent. See, e.g., Kahane v. Carlson, 527 F.2d 492, 497 (2d Cir. 1975) (Friendly, J., concurring) ("the Government . . . possibly, although I think erroneously, feeling bound by the statement in [a prior Second Circuit decision] . . . contests only the venue").

Jurocracy 78 (1977). Agency personnel who have either of the types of knowledge to the degree needed to run a very good acquiescence program will be a finite resource. The use of such personnel in trying to identify conflicts and in making recommendations whether to acquiesce will in most instances impose substantial opportunity costs on the agency. Similarly, if the agency head's involvement is to be more than that of a rubber stamp, the opportunity cost of diverting what is presumptively an agency's most valuable resource from other pressing concerns could also be considerable.

3. Justiciability of Nonacquiescence: The Lack of Benefit. While agency decisions regarding nonacquiescence should be rational, subjecting such decisions to judicial review offers few, if any, advantages over straightforward litigation on the merits of the underlying issue itself. If the prior court of appeals decision is one that the court of appeals itself is prepared to find is so clearly wrong that it should be overruled in a subsequent case, notwithstanding stare decisis, then it is difficult to see how the agency decision to nonacquiesce does not pass at least an APA standard of being rational. Similarly, if the issue is important enough for the Supreme Court to decide, and if it decides for the agency, one would again be hard pressed to see any meaningful sense in which the agency action was irrational. If, on the other hand, neither the Court of Appeals nor the Supreme Court is willing to rule for the agency on the underlying issue, then it is hard to see why the non-agency litigant ought not receive the benefit of the precedent, whether or not the agency is "rational" for continuing to disagree. If, for example, the 5th Circuit is not prepared to overrule a precedent that is, say, pro-management in one respect, then, if a case turns on that issue, management should win whether or not the NLRB decision to nonacquiesce is rational. See NLRB v. J. Weingarten Inc., 485 F.2d 1135, 1137 (5th Cir. 1973), rev'd, 420 U.S. 251 (1975). The same should probably apply for class action litigation. If the underlying legal issue is indeed one on which class certification is appropriate, a point which would not seem to turn on whether the agency has nonacquiesced or the rationality of its decision to nonacquiesce, then all class members, as litigants, should obtain the benefit of the court's merits rule, whether or not the agency nonacquiescence decision is rational.

Indeed, perhaps the reason why there has been so little litigation over nonacquiescence is partly because such litigation generally would add nothing (except complexity, cost,

delay, and rancor) to litigating the merits.[7] The recent litigation in the Social Security context seems at least partly to have been due to exceptional factors, for example, the need of plaintiffs to avoid a short jurisdictional time limit by characterizing nonacquiescence (wrongly, in our view, but appealingly) as a "collateral" issue. Perhaps, as a practical matter, a class action is more likely following perceived nonacquiescence. But if that is the case, even in that instance an agency may well be satisfied if it can have the court take a reasonably fresh look at the merits, for the first time on a class basis, even if the agency does not have the opportunity to obtain review of the question whether it was at least rational in adhering to a contrary position.[8]

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[7] Questions that could unnecessarily arise in acquiescence litigation might include such issues as whether a litigant who has not yet been affected by a particular policy or decision not to acquiesce has standing to litigate the agency's published, general statement of nonacquiescence in a particular court of appeals ruling.

[8] For example, although social security regulations are entitled to substantial deference from the courts, e.g., Heckler v. Campbell, 461 U.S. 458, 466 (1983), many of the allegations of nonacquiescence in that area amount to assertions that a regulation is inconsistent with statements in a decision, or the emanations of statements in a number of decisions, that did not consider the validity of the regulation. In the Lopez litigation, for example, the agency had a regulation, former 20 C.F.R. § 416.994, that compelled a result contrary to the rule plaintiffs argued Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982), had established, even though Patti nowhere discussed the regulation, let alone held it invalid. Similarly, the Second Circuit's "treating physician rule," at issue in the Stieberger litigation, does not rest on any rejection or construction of a particular regulation, or, seemingly, on an articulated construction of any particular language in the statute. Rather, the Second Circuit decisions cite earlier Second Circuit decisions, which ultimately cite Gold v. Secretary of Health, Education, and Welfare, 463 F.2d 38, 42 (2d Cir. 1972), which quotes Walker v. Gardner, 266 F. Supp. 998, 1002 (S.D. Ind. 1967), which cites Kerner v. Fleming, 283 F.2d 916 (2d Cir. 1960), which does not support the proposition.

A class action raising directly the contention that a regulation is inconsistent with the decisions would give the court an opportunity to address for the first time whether there really is an inconsistency, and to give due account for the first time to

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4. Justiciability of Non-Acquiescence: The Costs. As we have just noted, the benefits of litigating the rationality of acquiescence decisions are small or non-existent. By contrast, the costs of making such decisions justiciable may well be quite large. Indeed, we believe that holding such decisions justiciable in the name of deciding whether they are rational will perversely undermine the ability of agencies to make the decisions rationally.

If court of appeals opinions and agency policies were invariably so pellucid that the question whether they were inconsistent admitted of only one possible answer, judicial review would not be so problematic. But any litigant adopting an ongoing process to reconcile its policies to the rulings of the courts of appeals will necessarily confront situations in which it is not apparent whether a conflict exists or what reconciliation is necessary. If the false, or, more often, genuinely debatable, trails of tentative analysis that such a litigant's acquiescence process generates become fodder for the acquiescer's litigation opponents, the analysis of subordinates will tend to become more cautious, less thought-provoking, less willing to take the chance of leaving behind the safe ruts of conventional analysis.

Thus, if a process to identify conflicting court of appeals decisions and to decide whether to acquiesce is to work, it must be protected by attorney work product, attorney-client, and deliberative process privileges. In particular, the work of an acquiescence review board, or of attorneys charged with such functions, would seem to be a virtual textbook example of the reasons why a work product privilege exists.[9] Similarly, the

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[8](...continued)
the presumption that agency regulations are valid. Many agencies might be more likely to acquiesce in decisions that squarely face the issue whether a regulation, despite the presumptions that operate in its favor, is invalid, than in decisions the reasoning of which, agency opponents assert, compels the rejection of a regulation the court did not expressly hold to be invalid.

[9] See Hickman v. Taylor, 329 U.S. 495, 511 (1947)("Were such materials open to opposing counsel on mere demand, much that is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in preparation of cases for trial. The effect on the legal profession would be
(continued...)

classic description of the need for a decisional process privilege seem tailor-made for the acquiescence decision process.[10]

Thus, the drafts, recommendations, and advice that an acquiescence process generates should be privileged. However, an agency that set out today to adopt such a process could not be sure that such pre-decisional work product would be privileged. While draft (though not final) documents generated by the IRS acquiescence process were not required to be disclosed for FOIA purposes, Taxation with Representation Fund v. IRS, 646 F.2d 666, 672-73, 681-82 (D.C. Cir. 1981); Pies v. IRS, 668 F.2d 1350 (D.C. Cir. 1981), in the most extensive attempt to date to turn acquiescence decision-making into a justiciable lawsuit, the Stieberger litigation, the district court ordered even drafts disclosed to the agency's adversaries. If such disclosure of the agency's internal legal advice and analysis were to become routine, but only for agency litigants, the result of such a one-sided loss of privilege would be a type of the one-way ratcheting the Draft (e.g., at 129-31, 141) so rightly deplores.[11] If such

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[9](...continued)
demoralizing. And the interests of the clients and the cause of justice would be poorly served.").

[10] The point . . . is that the "frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and the "policies formulated" would be the poorer as a result. . . . As a lower court has pointed out, "there are incentives enough as it is for playing it safe and listing with the wind," Ackerly v. Ley, 137 U.S. App. D.C. 133, 138, 420 F.2d 1336, 1341 (1969), and, as we have said in an analogous context, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974) (emphasis added)."

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-51 (1975) (citations omitted).

[11] The discoverability of such documents would give agency opponents an incentive to label any action they disagreed with
(continued...)

new disclosure rules apply to all litigants, not just agencies,[12] then acquiescence theory will have been used to create major, society-wide exceptions to privileges heretofore felt reasonable, with effects on the legal system far exceeding the more modest claims of opponents of nonacquiescence.

Whatever the ultimate result of the privilege issue, the immediate result of the uncertainty is to discourage agencies from adopting an acquiescence process, or, at least, from adopting the type of candid and effective process that comes only with the ability of subordinates and attorneys to give advice in a privileged context.

It might be argued that even an ineffective acquiescence process is better than none at all. But, as an argument for making such a process justiciable and non-privileged, this misses the mark in at least three respects. First, the question is not whether an ineffective acquiescence process is better than nothing, but whether it is better than alternative uses for the same resources. Second, for the reasons we discussed in the preceding section, it is far from clear that making acquiescence process decisions justiciable will make the adoption of some process more likely. Third, even if it were assumed that an acquiescence process would not exist but for a goad of justiciability, and that the cost on that process of justiciability is hence an unavoidable one if there is to be a process at all, the damage would extend to essential governmental processes in the litigation area that already do exist.

For example, the Draft stresses that the rationality of an agency decision may be affected by the nature of the Solicitor General's decision whether to seek certiorari. It follows that there would be some cases where the Solicitor General's decision and accompanying deliberations on the question whether to file a certiorari petition would be a decisive factor. It is difficult to see how a court could review the "rationality" of an agency decision made at least in part in light of the Solicitor General's views without holding the recommendations to, and deliberations of, the Solicitor General no longer to be

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[11](...continued)
nonacquiescence if only for the advantage of breaching the privilege of whatever advice or cautions agency counsel may have given.

[12] The argument that there is a constitutional duty to acquiesce is often made in terms that apply to all litigants, not just agency litigants. See, e.g., Ithaca College v. NLRB, 623 F.2d 224, 228 (2d Cir.), cert. denied, 449 U.S. 975 (1980).

privileged, a result that would have an extremely deleterious impact on government litigation.[13]

5. The Constitutional Issue. For the reasons stated above, APA review of whether an agency has rationally non-acquiesced in court of appeals decisions is not the best solution to deal with the relation between agency and court of appeals decision-making authority. We recognize that even if such a solution is far from ideal in the perfect world of administrative law, whether it is a less bad solution than the status quo of the actual world is a closer question. It is certainly better than the alternative, absolutist position that some have proposed.

The Draft rightly rejects the absolutist position that acquiescence is a per se requirement imposed by the Constitution. However, in doing so the Draft (at 99) does not question the principal premise of those who argue for compelled acquiescence, that is, the absolutist reading of some of the language in Cooper v. Aaron, 358 U.S. 1 (1958), as establishing that a judicial decision operates as a command to non-parties in the same sense that a judicial order operates with respect to parties and that a statute demands obedience of persons generally. Of course, it may seem unfair to complain that a study that has done much pioneering work in examining the actual practices of nonacquiescence and the practical arguments for and against it does not also revisit the abstract constitutional question that many others have addressed. Yet leaving the question unexamined undermines the Draft's conclusions: If it is unconstitutional to nonacquiesce, the fact that it makes sense to do so in some

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[13] We agree with the Draft that, in the event that non-acquiescence does become a justiciable issue, the courts should not equate merely unpersuasive or losing arguments attempting to distinguish, or seeking the overturning of, a prior precedent with arguments that are frivolous. Draft at 160. However, we are less convinced than the Draft that in "the context of passing on sanctions for legally insubstantial positions under Rule 11 or the Federal Rules of Civil Procedure and the Equal Access to Justice Act, the courts have shown that they are capable of distinguishing between unsuccessful and frivolous claims," id. While it would clearly be desirable for courts to be able to make such distinctions, the proposition that they will in fact be able to do so on any consistent basis is still very much in doubt. See, e.g., Note, Plausible Pleadings, 100 Harv. L. Rev. 630, 637-41 (1987).

situations is beside the point, as is a detailed analysis of factors bearing on when nonacquiescence is or is not justified.[14]

There are several reasons why the absolutists' reading of Cooper v. Aaron is not justified. One of those reasons, that the defendants in Cooper were state officials rather than officers of a co-equal branch, the Draft rejects (Draft at 103) but at least considers; we will leave that disagreement where it stands. More broadly, however, Cooper involved a situation where state officers were ignoring not just precedents but orders in a case in which they were parties, see 358 U.S. at 12. That is not (or at least not just) nonacquiescence--it is contempt. Language in Cooper that was broader than necessary to decide the case hardly compels the extraordinary conclusion that it was departing from the long-held understanding that judicial precedents operate as precedents, not as orders or statutes. That principle has not only been expressed by Attorney General Meese,[15] as the Draft notes, but also by such diverse figures as

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[14] The question of what is nonacquiescence, which the Draft addresses in terms of venue uncertainty, would remain open, as would the question whether a challenge to nonacquiescence would be justiciable, or whether, like some other constitutional rules, its observance depends on comity and related doctrines.

[15] Meese, The Law of the Constitution, 61 Tulane L. Rev. 979 (1987).

former Justice Robert Jackson,[16] Professors Hart,[17] Wechsler,[18] and Chayes,[19] and President Lincoln.[20]

Moreover, the Draft itself eventually reaches a position that effectively amounts to a rejection of the absolutists' reading of Cooper, but, because it refuses to take on that reading explicitly, reaches only an approximation of the correct position and does so only in a confusing manner. As the Draft notes, there can be an ongoing "process of interpreting a unitary national law" (Draft at 106, emphasis and footnote omitted), which can result in a period when the law is in "flux," id. at 106 n.286, ultimately (at least in some cases) leading to a period when federal law development has been completed, id. at 104. Asking whether "the Supreme Court and courts of appeals

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[16] R. Jackson, The Supreme Court in the American System of Justice 13 (1955):

> [T]he judicial decree, however broadly worded, actually binds, in most instances, only the parties to the case. As to others, it is merely a weather vane showing which way the judicial wind is blowing--a precedent that the Court in a similar case is likely to follow. Its real weight in subsequent cases, however, will depend on many factors, such as the quality of the prevailing opinion, the strength of any dissent, the acceptance or criticism by the profession, and the experience in the application of the rule.

[17] Hart, Book Review, 67 Harv. L. Rev. 1456, 1457-58 (1953).

[18] Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1008 (1965) (the function of courts is to decide cases rather than to "pass a statute calling for obedience by all within the purview of the rule that is declared").

[19] Chayes, How Does the Constitution Establish Justice? 101 Harv. L. Rev. 1026, 1040 (1988) ("Attorney General Meese was roundly criticized for his statement that the true meaning of the Constitution is not necessarily what the Supreme Court says it is. I do not see how anyone, certainly not any law professor, can disagree with that: we ourselves claim the prerogative to tell students that the Supreme Court is wrong.").

[20] Lincoln, First Inaugural Address, 4 The Collected Works of Abraham Lincoln, 268 (R. Basler ed. 1953); 2 id. 255 (debate with Douglas).

occupy sufficiently different positions in our legal system as to place in question the applicability of Cooper v. Aaron to intra-circuit nonacquiescence," Draft at 104, and concluding that "rulings of the courts of appeals . . . are in a sense only intermediate points of decision in this process of federal law development," id. at 105, only approximates the correct inquiry. As the Draft implies, the validity of nonacquiescence turns critically on whether the federal law development is completed, whether there really is any legitimate ground for doubt.[21] The difference in role between the courts of appeals and the Supreme Court is one factor in that calculus, but it is not always decisive. As the Draft correctly notes, federal law can be effectively settled, even though the Supreme Court has never ruled. Draft at 106 n.286. But it is likewise the case that the law can sometimes be effectively unsettled even though the Supreme Court has made a ruling.[22] Thus, the true meaning of Cooper v. Aaron depends on the fact that there was no basis whatsoever for believing that the law was any longer in flux. See Draft at 104. That conclusion turns on more than the formal fact that a Supreme Court precedent on the point exists. It is difficult, for example, to imagine a Cooper v. Aaron opinion being written where the underlying precedent was a 30-year old 5-4 decision that had been roundly criticized in the law reviews. The expansive view of Cooper, that nonacquiescence is unconstitutional because of the existence of a formally controlling opinion, regardless of the wide range of variance in the other factors that Justice Jackson recognized affect an opinion's "real weight," R. Jackson, The Supreme Court in the American System of Government 13 (1955), is, we submit, wrong.[23]

When the issue is nonacquiescence in decisions of the federal courts Congress has created below the Supreme Court, there are, of course, even further reasons for rejecting an

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[21] We are now putting to one side the co-equal branch argument.

[22] Chayes, How Does the Constitution Establish Justice? 101 Harv. L. Rev. 1026, 1040 (1988), gives a classic example of this type of possibility.

[23] Of course, nonacquiescence in Supreme Court decisions has been used by the other branches only in exceptional situations, and we do not suggest that the practice should be otherwise. The point is instead critical because the erroneous view that Cooper v. Aaron holds that decisions should be treated like orders or statutes makes it impossible to analyze non-acquiescence issues properly.

absolutist constitutional approach to nonacquiescence.[24] As the Draft points out (at 123 n.308), the extent to which precedent is regarded as binding by the courts for the judiciary's own purposes is a historical accident. Draft at 123 n.308. The judiciary could, for its own internal governance, constitutionally choose to have a more thorough-going regime of stare decisis than it does (Supreme Court summary affirmances given greater weight, circuit opinions binding on other circuits, or district court opinions binding in the same district) or a less thorough-going regime (summary affirmances given less or no weight; panel decisions not binding on other panels in the same circuit, just as the decisions of a district judge are not binding on other judges in that district). It would seem an unusual constitutional doctrine that would have the judiciary's authority over the executive depend upon rules for the judiciary's own internal governance that the judiciary (or Congress) is free to alter or amend unilaterally. The explanation is that acquiescence is not a constitutional doctrine; that the judiciary may change its internal arrangements regarding stare decisis precisely because in doing so it is not aggrandizing itself by extending the sweep of its commands; that stare decisis operates not as a command to agencies and other litigants, but as a prediction for agencies and other litigants.[25] (In law, as in life, one sometimes ignores predictions only at considerable peril (EAJA fees, for example), but the distinction between commands and predictions is still fundamental.)[26]

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[24] We will not repeat the Draft's analysis of many of the factors contributing to this conclusion.

[25] See W. O. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949) ("even for experts law is only a prediction of what judges will do under a given set of facts").

[26] One respect in which courts have relatively recently changed their stare decisis rules is the adoption by most circuits of rules to preclude citation of, and reliance upon, their unreported decisions as precedent. If compelled acquiescence becomes the law, these rules would work systematically to the disadvantage of agency litigants since "reversals are much more likely to be reported in published opinions than affirmances, which frequently are disposed of by unpublished orders . . ." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986); accord, Stieberger v. Bowen, 801 F.2d 29, 36 (2d Cir. 1986) ("As the Secretary has pointed out, published opinions of this Court and the district courts tend to occur where error is noted."). If compelled acquiescence becomes the law, then these rules would allow courts unilaterally to choose which of their decisions will

(continued...)

Thus, while we recognize that the Draft's proposal may be better than the proposals of acquiescence absolutists, we believe that a still better approach would be to try to disentangle the confusion of judicial decisions with statutes or court orders that has been engendered by the absolutists' arguments.[27]

6. APA Amendment. On balance, we oppose amending the Administrative Procedure Act to address nonacquiescence issues. While addressing the issue substantively in legislation may serve some useful purposes--serving as a reminder to agencies that nonacquiescence is not to be done lightly, and cooling some of the more superheated rhetoric of agency opponents--legislation could not resolve the constitutional issue, and could create new problems of its own, as the unexpected variety of actual circumstances would not conform to the circumstances that legislators might foresee in writing rigid legislative rules.

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[26](...continued)
be like a statute, and which will have only a specific-case effect, without any of the safeguards that the class action device affords (including opportunity for litigant participation in, and notice to litigants in advance of the merits decision, whether the case will have class-wide effect). There would thus be a serious issue whether such no-citation rules, already questioned by some (see County of Los Angeles v. Kling, 474 U.S. 936, 938 & n.1 (1985) (Stevens, J., dissenting) (collecting authorities)), would be constitutional in a compelled acquiescence regime.

[27] We note that, while this confusion works to the disadvantage of the executive branch in the immediate context of nonacquiescence, in broader contexts the harm caused by the confusion may hurt the other branches. For example, confusing decisions with statutes may be at least as likely to weaken the force of statutes as it is to strengthen the force of decisions. Already, there is tendency among some lawyers subconsciously to look to what courts say about statutes, before and in preference to looking at the statutes themselves. Is it really worse, as the rhetoric of nonacquiescence seems to imply, for a federal agency to act contrary to a doubtful and debatable 2-1 decision of a panel than it is to act contrary to a reasonably clear, albeit not yet litigated, statute? And, if decisions come to have as much force as orders, orders will have no more force than decisions. Because the concerns that legitimately affect when an issue should be revisited differ for orders and decisions, we think the difference is worth preserving, and the obliteration of the distinction through the absolutist reading of Cooper will ultimately hurt the judicial as well as the executive branch.

Addressing the issue procedurally, by making agency decisions subject to judicial review, would not seem to create significant practical benefits and would impose substantial practical costs.

7. Addressing Venue Uncertainty. The Draft's proposals for ending avoidable venue uncertainty would seem in practice mostly to affect agencies that have their own litigation authority, so we have only the following brief comments on those issues.[28]

First, one virtue of allowing multiple venues is that the venue chosen is likely to be a permissible one. Designation of a single, non-exclusive venue would in most cases have to be based on some concept of where the dispute arose. See, e.g., Leroy v. Great Western United Corp., 443 U.S. 173 (1979). In some statutory schemes that may not be clear, and the attempt to restrict review to a single venue may give rise to too much litigation about which one venue is the singular correct venue. Second, there should also be some consideration given to how, if at all, such a change would be likely to affect the number of cases in which agencies will need to seek Supreme Court review. See generally Strauss, One Hundred Fifty Cases Per Year, 87 Colum. L. Rev. 1093, 1105-16 (1987); United States v. Mendoza, 464 U.S. 154 (1984).

8. Draft Recommendation 88 - ___. The Draft Recommendation's proposals for dealing with intracircuit non-acquiescence do not include a provision suggesting an APA amendment. As noted above, we agree that such a provision is largely unnecessary. However Recommendation 2 suggests that there would or should be judicial review of (and possible sanctions for) the decision to non-acquiesce per se. As stated previously, we believe this form of judicial review is inappropriate. The general guidelines as to when non-

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[28] One type of venue uncertainty not noted by the draft arises because many federal actions or polices may be reviewed in state court, either directly, e.g., 7 U.S.C. § 2023, or indirectly, e.g., 19 U.S.C. § 2311(d). Since intermediate federal courts do not enjoy sovereign responsibility over their territory, Draft at 106, state courts, while constitutionally obliged to follow federal law, are under no obligation to follow the interpretations of that law made by any particular inferior court that Congress chose to create. E.g., 1B J. Moore, Federal Practice 23 (2d ed. 1984). Thus, where federal actions or policies are reviewable in state or federal court, the situation is similar to that in which action is reviewable in more than one federal circuit court. However, it is difficult to discern a way to eliminate this form of venue uncertainty without entirely eliminating state court review of federal actions.

acquiescence is appropriate (Recommendation 1) appear to be reasonable ones for the agencies to consider internally, subject to limitations discussed above regarding difficulties in obtaining prompt relitigation and/or Supreme Court review. We have already discussed the venue suggestions in the Draft Report which are similar to those contained in Draft Recommendation 4. Finally, the Civil Division is generally in agreement with Recommendation 3.

We appreciate both the work that the Conference and Professors Estreicher and Revesz have devoted to this project, and the opportunity provided to us to comment upon the work.

Sincerely yours,

John R. Bolton
Assistant Attorney General

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

May 9, 1988

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Dear Ms. Fowler:

Deputy Solicitor General Donald Ayer has referred to us your invitation to this Office to submit comments on (i) the draft report entitled "Nonacquiescence by Federal Administrative Agencies," which was prepared by Professors Estreicher and Revesz at the request of the Administrative Conference, and (ii) the tentative draft of Recommendation 88, entitled "Agency Nonacquiescence in Decisions of the Courts of Appeals," which is to be considered by the Administrative Conference's Committee on Judicial Review.

We appreciate the opportunity to review the draft report and recommendation, and we believe that the Committee's study of nonacquiescence will contribute to the public dialogue on the subject. In particular, the draft report by Professors Estreicher and Revesz contains a useful discussion of the practices of several agencies, the constitutionality of nonacquiescence, various circumstances in which the issue can arise, and the considerations an agency might take into account in determining whether to apply the reasoning of a court of appeals decision in its administration of an Act of Congress. However, because of the variety of situations in which the issue may arise, we do not believe the subject of nonacquiescence necessarily lends itself to a single mandatory approach -- even one cast in general terms, as suggested in the draft recommendation. Nor do we believe that it is necessary or practicable for Congress or the courts to attempt to prescribe concrete, judicially enforceable standards for determining when

nonacquiescence would be appropriate. In our view, the decision whether to acquiesce or not to acquiesce should be left to the individual agencies, in consultation with the Department of Justice and the Solicitor General. We therefore urge that the tentative draft recommendation be modified so as to make clear (i) that nonacquiesence is not inherently or presumptively improper, (ii) that the suggested criteria for nonacquiescence are intended to constitute only a nonexclusive statement of principles that the Administrative Conference believes the agencies should take into account, and (iii) that nonacquiescence decisions, as such, should not be separately made subject to judicial review.

Assistant Attorney General John R. Bolton also has submitted comments on the draft report and recommendation. We endorse the comments in his submission and do not repeat them here. We offer the following additional observations, emphasizing points that previously have been addressed by the Solicitor General in other settings or are of particular interest to this Office.

1. We agree with the conclusion in the draft report (and, implicitly, in the tentative draft recommendation) that the doctrine of separation of powers under the Constitution does not bar a federal agency from declining to apply the reasoning of a particular court of appeals decision in the agency's further administration of a statutory program outside of the context of the particular case in which the court rendered its decision. The Solicitor General took that position in the Supreme Court in the application for a stay pending certiorari and the petition for a writ of certiorari in Heckler v. Lopez, 469 U.S. 1082 (1984).

As we argued in Lopez, the principles governing the extent to which the Constitution requires the decision of an Article III court to be given binding effect derive directly from Article III itself. Article III provides that the "judicial Power" shall be vested in one Supreme Court and such inferior courts as Congress may ordain and establish. The "judicial Power" extends only to deciding "Cases" and "Controversies," a limitation that requires the existence of concrete adverseness between the opposing litigants before the court. INS v. Chadha, 462 U.S. 919, 939 (1983). A necessary element of the judicial power under Article III is that the judgment of the court is final as between the parties to the particular case and cannot be made subject to revision by the Executive or Legislative Branch. See Hayburn's Case, 2 U.S. (2 Dall.) 409 (1793); United States v. O'Grady, 89 U.S. (22 Wall.) 641, 647-648 (1874); Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 113-114 (1948). But cf. United States v. Sioux Nation, 448 U.S. 371, 390-407 (1980).

By contrast, although the Supreme Court has held that a federal court has the authority under Article III to enter appropriate orders to prevent or punish action that interferes with its judgment in the same case, whether by parties to the case (Young v. United States ex rel. Vuitton et Fils S.A., No. 86-1329 (May 26, 1987)) or by third parties (Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 692-693 n.32 (1979)), the Court has never held that Article III (or any other provision of the Constitution) requires that the disposition of legal issues underlying the judgment of an Article III court in one case must be given a binding effect in a different case. The extension of legal principles applied in a particular decision to other factual contexts and other parties not before the court is not an essential ingredient of the judicial power to decide discrete "Cases" and "Controversies." To the contrary, the prescription of general rules of conduct that operate directly on persons outside the Judicial Branch is the province of Congress in passing laws and of the Executive Branch in issuing regulations or taking other administrative action in the execution of the laws.

Nor is there any special rule under the Constitution that obligates an agency of the United States, unlike private entities or persons, to apply the legal principles announced in a court of appeals decision to the conduct of the agency's own internal affairs, either generally or in matters arising in the particular circuit. For example, in United States v. Estate of Donnelly, 397 U.S. 286 (1970), in which the court of appeals whose decision was under review had previously rendered a decision adverse to the United States on the same issue, but the United States had declined to follow the reasoning of that decision, the Court stated (id. at 294-295):

> Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward. Generally the United States, like other litigants, is entitled to adhere to what it believes to be the correct interpretation of a statute, and to recoup the benefits of that adherence if it proves to be correct, except where bound to the contrary by a final judgment in a particular case. [1/]

1/ Estate of Donnelly was decided after Cooper v. Aaron, 358 U.S. 1 (1958), which is discussed in the draft report and in Assistant Attorney General Bolton's letter.

See also Heckler v. Lopez, 463 U.S. 1328, 1336 (1983)(Rehnquist, Circuit Justice)(rejecting the "constitutional" label attached by the respondent class of disability claimants to their argument that the Secretary of Health and Human Services had impermissibly nonacquiesced in Ninth Circuit precedent regarding the evidentiary showing necessary to establish continuing entitlement to benefits), motion to vacate stay denied, 464 U.S. 879 (1983); see also id., 464 U.S. at 883 (Stevens, J., dissenting in part)("I agree with JUSTICE REHNQUIST that respondents' contention that their claim is a 'constitutional' one should be disregarded").

At bottom, the assertion that a government official, such as the Secretary of Health and Human Services in his administration of the Social Security Act, must follow the reasoning of a court of appeals decision in other circumstances involving other parties is merely an assertion of nonmutual collateral estoppel against the government, which the Supreme Court unanimously rejected even as a nonconstitutional matter in United States v. Mendoza, 464 U.S. 154 (1984). There, the Court held that although the government is bound to a prior judgment under the principles of res judicata, it "is not further bound in a case involving a litigant who was not a party to the earlier litigation." Id. at 162. A fortiori, there is no merit to the far more extreme position that a government agency is constitutionally compelled to accept the reasoning of one court of appeals decision in cases involving other persons.

We do not suggest, of course, that administrative agencies should simply ignore the opinions of the courts of appeals. Principles of fairness, sound administration, and comity between the Judicial and Executive Branches all counsel an agency to give special regard to decisions rendered by the courts on matters within the agency's jurisdiction. We suggest only that the Constitution does not of its own force require the head of an executive agency to conform the agency's practices to a court of appeals' analysis of the various legal issues that might arise under a statute that Congress has charged him with administering.

Nevertheless, it is important to recognize, as the draft report and recommendation do, that the issue is not one of constitutional dimension. One of the purposes of the proposals under consideration by the Committee is to eliminate "friction" between the courts and administrative agencies. That friction, however, is largely a reflection of the erroneous view of some courts (and others) that executive agencies are constitutionally required to treat an opinion rendered by a court of appeals as a binding command of general applicability -- much like a statute or regulation -- that must be followed by the agency even outside the context of the particular case decided by the court. Once

that sweeping premise is shown to be erroneous, the subject of nonacquiesence in a court of appeals decision may be considered in its proper context: as a question of administrative policy that -- like all other such questions -- should be addressed by the agency charged by Congress with implementing the statute, in consultation with the Department of Justice and the Solicitor General. The agency then can draw upon its experience and expertise in fashioning an appropriate response to judicial decisions at all levels of the federal court system, taking into account any special policies reflected in the statutes it administers and any special circumstances confronted by the agency in carrying out its programs.

2. The draft report and recommendation also wisely reject the notion that Congress should enact a statute imposing a rigid requirement that administrative agencies must acquiesce in all court of appeals decisions within the relevant circuit. Congress declined to enact such a provision specifically for the Social Security disability program when it passed the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 et seq. The bill passed by the House contained a provision that would have required the Secretary to follow a decision of a court of appeals within the circuit unless he sought Supreme Court review. See H.R. Rep. 98-618, 98th Cong., 2d Sess. 22-26 (1984). The Senate bill, however, did not contain such a requirement; it would have required only that the Secretary publish in the Federal Register and report to Congress any decision not to follow a court of appeals decision. S. Rep. 98-466, 98th Cong., 2d Sess. 21 (1984). 2/ Congress declined to

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2/ The Senate Report stated (ibid.):

> The Committee is aware that a dispute exists as to the right of the Secretary to not acquiesce in circuit court decisions. While the Committee is concerned that a policy of mandatory acquiescence would be difficult to reconcile with the long standing Congressional importance attached to national uniformity, this legislation does not attempt to resolve that issue. Those who argue that the Secretary has no such right frequently cite the case of Marbury v. Madison in support of their contention that the Secretary's position violates the principle that the courts may interpret the laws. On the other hand, the Committee received testimony from the Department of Justice that the ability to not acquiesce is an important element of the Government's ability to pursue litigation in an orderly manner. Accordingly, the implications of changing this practice range widely beyond the Social Security Act. In its

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include any provision on nonacquiescence in the 1984 Act as finally passed. The Conference Report stated that questions had been raised about the constitutionality of nonacquiescence and that many of the conferees had concerns about the way in which the policy had been applied even if it is constitutional, and the conferees urged that a policy of nonacquiescence be followed only where the Social Security Administration has a reasonable expectation and intention of initiating steps necessary to receive a review of the issue in the Supreme Court. H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 36-38 (1984).

Significantly, however, during the Senate debate on the Conference Report, Senator Dole stated that although some conferees had expressed concerns about the practice of nonacquiesence, "it is not the position of the Senate that the practice is unconstitutional as exercised by the Department of Health and Human Services or by any other Federal agency." 130 Cong. Rec. S11454 (daily ed. Sept. 19, 1984). In that regard, Senator Dole made part of the record a letter from Solicitor General Rex Lee that, in Senator Dole's words, took the position "that nonacquiescence is constitutional, and that a prohibition of nonacquiescence would have serious adverse implications for the Government's litigation in the Social Security area." Ibid. Solicitor General Lee explained that a rule of mandatory acquiescence could have an adverse effect on the Solicitor General's longstanding policy of carefully screening cases for Supreme Court review and, in many instances, awaiting a circuit conflict before presenting a legal issue for review. Id. at S11454-S11455; see Sup. Ct. Rule 17.1(a). Solicitor General Lee also explained that in United States v. Mendoza, the Supreme Court stressed the importance of the Solicitor General's role in screening cases for Supreme Court review and in implementing the Executive Branch's litigation and substantive policies when doing so; and he pointed out that the Court recognized that application of a rule of nonmutual collateral estoppel against the government would undermine the Solicitor General's role.[3] See 464 U.S. at 160-162. 3/ The same considerations of course also weigh against

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testimony, the Justice Department cited a recent case, United States v. Mendoza in which the Supreme Court upheld the Government position in an issue closely related to nonacquiescence.

3/ In United States v. Providence Journal Co., No. 87-62 (May 2, 1988), the Supreme Court recently reiterated its view of the importance of the Solicitor General's role in screening cases for review by the Court and assuring that the United States speaks with one voice before the Court. Slip op. 8-9 & n.7, 12-13.

requiring acquiescence in appellate decisions within the circuit concerned, because that would simply be another label for enforcing a rule of nonmutual collateral estoppel against the government.

For the convenience of the Committee, I have enclosed a copy of the pages in the Congressional Record that include Solicitor General Lee's letter to Senator Dole. The considerations expressed in that letter of course apply even more forcefully to any proposal to require acquiescence in court of appeals decisions on a government-wide basis.

3. Although the tentative draft recommendation under consideration by the Committee does not propose that acquiescence be mandated in all cases, it does propose that agencies should engage in nonacquiescence only in certain circumstances. Specifically, paragraph 1 of the tentative draft recommendation states that an agency should not engage in intracircuit nonacquiescence unless "(a) the agency has responsibility for securing a nationally uniform policy with respect to a question that was the subject of the adverse judicial decision; (b) the agency is reasonably seeking the vindication of its position both in the courts of appeals and before the Supreme Court, or through the active pursuit of legislative change; and (c) there is a justifiable basis for belief that the agency's position falls within the scope of its delegated discretion."

a. The draft recommendation apparently proposes these standards only as an expression of the Administrative Conference's view of the principles that should guide administrative agencies, since the recommendation does not appear to adopt the suggestion in the draft report that Congress should enact such principles into law. As noted above, we agree that Congress should not adopt general statutory standards in this area, just as Congress declined to enact a statutory provision addressing the subject of nonacquiescence specifically for the disability program in 1984, despite the controversy that surrounded the subject at that time (but has since subsided (see note 5, infra)).

The circumstances in which the nonacquiescence issue might arise vary too much -- among agencies, among programs administered by the same agency, and among the types of court of appeals decisions that might present an agency with an occasion to consider nonacquiescence -- to admit of a uniform statutory solution. The recommendation and draft report acknowledge one such variant: the venue provisions under the National Labor Relations Act, which make it uncertain which court of appeals might ultimately review the Board's decision in any given case. The draft recommendation proposes that no acquiescence principles

be adopted for administrative programs that are subject to such uncertainty of venue for judicial review. In our view, however, the venue provisions under the National Labor Relations Act are simply one particularly vivid manifestation of more general concerns that would be raised by a statutorily mandated rule of acquiescence. As regards those agencies whose decisions in a category of cases would be reviewed by only one court of appeals, the certainty of venue presumably would be of considerable importance to the agency in deciding how to respond to an adverse opinion rendered by that court of appeals. But the existence of an adverse judicial decision in the circuit still should not be a dispositive factor, and indeed the draft recommendation acknowledges as much and accordingly does not propose a rule of mandatory acquiescence in all appellate decisions, even where the venue of judicial review is certain. We therefore see no need to attempt to fashion uniform rules for all agencies that are not subject to venue uncertainty, especially if the rules would be enacted into law. Moreover, as noted below (see note 5, infra), agencies are beginning to address the nonacquiescence issue more thoroughly in their own programs. It would be unwise to freeze these developments by the enactment of rigid statutory standards.

b. Although it does not advance a statutory solution, paragraph 1 of the tentative draft recommendation does propose that an agency responsible for assuring nationwide uniformity in its administrative program should not engage in intracircuit nonacquiescence unless: (a) the agency is reasonably seeking vindication of its position both in the courts of appeals and the Supreme Court, and (b) there is a justifiable basis for believing that the agency's position falls within the scope of its delegated authority. We shall discuss the second of these two limitations first.

(i) If paragraph 1 is intended only as guidance for administrative agencies and would not be judicially enforceable, the second of these limitations is essentially superfluous: presumably the agency would not advance its position in any court (even prior to the rendering of an adverse court of appeals decision) if the agency was not of the view that it had a justifiable basis for believing that the position was within its statutory authority.

This limitation would be more problematic if it were to be enforced by the courts in some manner. Paragraph 1 of the tentative draft recommendation does not indicate that an agency's nonacquiescence decision would be subject to judicial review. Paragraph 2, however, states that a court should not impose "sanctions" on an agency for, or enjoin an agency from engaging in, intracircuit nonacquiescence where the conditions in paragraph 1 are met. The negative implication would appear to be

that a court could impose "sanctions" or enter an injunction where the standards in paragraph 1 are not met. Paragraph 2 therefore seems to contemplate some form of judicial review of an agency's decision not to acquiesce in court of appeals precedent. Indeed, the reference to "sanctions" implies that there is something inherently improper about nonacquiescence; as explained above, however, there is no overarching principle that inflexibly mandates that an agency adopt the reasoning expressed by a court of appeals in rendering a decision.

Moreover, for the reasons stated in Assistant Attorney General Bolton's letter (at 6-7), it seems essentially pointless to invite a new category of litigation concerning the appropriateness of the agency's decision to nonacquiesce in circuit precedent in a particular instance, as distinguished from litigation on the merits of the substantive agency policy that is alleged to be inconsistent with circuit precedent. After all, it is the substantive agency policy, as applied to a particular person (such as a claimant seeking Social Security benefits) -- not the agency's decision to nonacquiesce as such -- that would have an adverse impact on that person. Moreover, Congress typically has provided for judicial review of the agency's decision applying general policies to the circumstances of individual cases (such as the provision in 42 U.S.C. 405(g) for judicial review of the Secretary's final decision on a claim for benefits under the Social Security Act, or the provision in 29 U.S.C. 160(f) for judicial review of the decisions of the National Labor Relations Board), but has not typically provided for judicial review of the agency's general determination not to acquiesce in a court of appeals decision on a discrete legal issue that might arise in the course of individual administrative adjudications. 4/

4/ In an analogous situation, if a district court is allegedly failing to follow circuit precedent in pre-trial or trial proceedings, a party to the case in district court could not take an interlocutory appeal as of right on that distinct question. And on appeal from the district court's final judgment, the central question before the court of appeals would be whether the district court's judgment was correct on the merits, applying circuit precedent and other legal principles. Whether the district court had somehow acted improperly by failing to follow circuit precedent would be essentially beside the point, except to the extent that the district court's evident misapplication of circuit precedent informed the court of appeals' review of the district court's decision on the merits.

It also is unclear how the tentative draft recommendation contemplates that the second of the two limitations discussed above would be applied by a court. If the question whether the agency has a "justifiable" belief that its legal position is within its delegated authority is the same as the question whether there is a reasonable basis for the agency's interpretation, then judicial review of the agency's decision to nonacquiesce would be little different from judicial review of the agency's position on the merits, since the agency's position should be sustained if it is a reasonable interpretation of the statute. Young v. Community Nutrition Institue, 476 U.S. 974, 980-981 (1986); Chevron U.S.A. v. NRDC, 467 U.S. 837, 842-845 (1984).

On the other hand, if the legal standard to be applied by the court is different from that to be applied in judicial review of an agency's decision on the merits, then the tentative draft recommendation would appear to require the courts to engage in what we believe would be a largely metaphysical and speculative inquiry into whether the agency's position, even though incorrect on the merits under the precedent of the relevant court of appeals, is nevertheless sufficiently plausible that it might be sustained by other courts of appeals and that the agency therefore should be permitted to adhere to that position in administrative proceedings that might later be subject to review in the court of appeals that has already rejected the agency's position. This seems to us to be a quite unproductive exercise for the courts. The more straightforward relationship between the courts and the agency in such a situation would be for the court to wait until the agency has concluded its administrative proceedings with respect to a particular person and rendered a final decision on the merits as regards that person, and then to review the agency's final decision on the merits. On judicial review of the final decision, the court of appeals, with a complete evidentiary record and the benefit of the agency's reasoning before it, could decide whether to adhere to its prior precedent or to overrule or limit it. The agency might also choose, if authorized and appropriate under the circumstances, to waive a requirement of administrative exhaustion as a prerequsite to judicial review.

We also think that a new regime of judicial review on the distinct question of nonacquiesence is unnecessary, because of other mechanisms that naturally control or limit the practice of nonacquiescence. For example, when a court reviews an agency decision on the merits, the existence of prior circuit precedent on a dispositive legal issue in the case would be a relevant factor in determining whether the agency's position was "substantially justified" for purposes of the award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C.

2412(d)(1)(A). Furthermore, if an agency unrealistically persists in a legal position that the courts have found untenable, the agency and the Justice Department, as its representative in court, would undermine their credibility with the courts. Finally, as we explain in the next section, the internal deliberative process associated with the Solicitor General's decision whether to authorize an appeal or the filing of a petition for a writ of certiorari results in close scrutiny of the legal issues involved from a number of different perspectives within the government and thereby further deters the agency from taking unreasonable positions in administrative proceedings or before the courts. Thus, any abuses in this area are largely self-correcting.

(ii) The meaning of the first limitation proposed in paragraph 1 of the tentative draft recommendation -- that the agency is "reasonably seeking" to vindicate its position in the courts of appeals and the Supreme Court -- also is unclear. Some agencies, like the Department of Health and Human Services under the Social Security programs, do not "seek" vindication of their positions in the courts. Rather, under the Social Security programs, the burden is on the claimant who is aggrieved by the final administrative decision to seek judicial review of that decision. See 42 U.S.C. 405(g). If the claimant seeks judicial review in a district court whose decisions are subject to review by a court of appeals that has rejected the Secretary's position on a particular legal issue, the district court presumably will rule for the claimant on that particular issue (although it might rule for the Secretary on other grounds). It then is the responsibility of the Solicitor General, not the Department of Health and Human Services, to determine whether to take an appeal from the adverse district court decision, as well as to determine whether to seek Supreme Court review of a court of appeals decision rejecting the Secretary's position. A consideration of the agency's efforts to vindicate its position in the courts therefore cannot be separated from the Attorney General's and the Solicitor General's control over government litigation generally.

If the tentative draft recommendation intends to make the propriety of an agency's nonacquiescence in a court of appeals decision turn in part on a consideration of the Solicitor General's determinations in the conduct of the government's appellate litigation, the standards under paragraph 1 becomes far more complex. And if those standards are intended to be anything more than guiding principles, they would, in our view, be largely unworkable. The Solicitor General's determinations about the conduct of appellate litigation must take into account a number of considerations in addition to the interest in seeking vindication of the agency's position on a particular legal

issue. For example, in deciding whether to take an appeal from an adverse district court decision, the Solicitor General must consider: (a) whether there are alternative grounds that might support a ruling in favor of the opposing party; (b) whether the legal issue is properly presented on the administrative record before the court; (c) whether the legal issue arises in a typical context, such that an appellate ruling would be of sufficient precedential importance to warrant an appeal; (d) whether the circumstances of the case are sufficiently favorable to the claimant that the government should forgo an appeal for equitable or tactical reasons; (e) whether the government should forgo an appeal in a particular circuit (especially the one that has already ruled against the government) until one or more other circuits have passed on the question; and (f) whether a decision by another court of appeals (or by the Supreme Court in a related area) may reasonably be expected in the near future. In addition, in deciding whether to petition for certiorari, the Solicitor General must consider the standards applied by the Supreme Court in deciding whether to grant review (see Sup. Ct. Rule 17), as well as the overall interests of the Executive Branch in preserving the limited "slots" available to the government for use in those cases that are most important from a government-wide perspective and in preserving the Solicitor General's credibility with the Court in his selection of appropriate cases for review.

The nature of these factors counsels strongly against any attempt to reduce to a few concrete rules the circumstances in which nonacquiescence in circuit precedent is appropriate, at least if, as paragraph 1 of the tentative draft recommendation proposes, the appropriateness of doing so turns on determinations made in the pursuit of appellate litigation. We note as well that the internal deliberative process that precedes the Solicitor General's decision whether to take an appeal or to petition for certiorari already largely accomplishes the objectives sought to be achieved by the proposal before the Committee. The relative strength of the agency's position is fully examined in memoranda prepared for the Solicitor General by the agency, the responsible litigating division of the Department of Justice, an Assistant to the Solicitor General, and a Deputy Solicitor General. Where the Solicitor General declines to authorize an appeal or a petition for certiorari, the agency will ordinarily have a reasonable indication of whether an appeal or certiorari would be authorized in another case and whether those persons in the Justice Department who have examined the issue believe the legal issue to be sufficiently meritorious to be pressed in future cases. This internal check has worked reasonably well for many years. There is no reason to supplement it by externally imposed standards.

We would be particularly disturbed by any suggestion that a court, as an aspect of engaging in judicial review of an agency's decision not to acquiesce in a court of appeals decision, could review the reasonableness of the Solicitor General's litigating judgments. Judicial review of the decision by the responsible Executive Branch official to invoke the jurisdiction of the courts, or to decline to do so, would not be consistent with the separation of powers under the Constitution. Compare Heckler v. Chaney, 470 U.S. 821, 832 (1985); Buckley v. Valeo, 424 U.S. 1, 138 (1976); United States v. Nixon, 418 U.S. 683, 693 (1985). Moreover, the conduct of litigaton on behalf of Executive Branch agencies -- assuming that it even constitutes "agency action" for purposes of the APA (see 5 U.S.C. 551(13)) -- is a matter committed to agency discretion within the meaning of 5 U.S.C. 701(a)(2), and therefore is not subject to judicial review. Heckler v. Chaney, supra. We note as well that the Solicitor General uniformly declines to state his reasons for authorizing or not authorizing an appeal or petition for a writ of certiorari, and the reasons of those who submit recommendations to the Solicitor General on such questions are privileged internal deliberations. Any system contemplating judicial review of the reasonableness of the Solicitor General's decisions might threaten this tradition of confidentiality, which is essential to the conduct of government litigation. Compare Hickman v. Taylor, 329 U.S. 495, 511 (1947).

c. In our view, the foregoing considerations strongly suggest that the Committee should refrain at this time from recommending any particular set of principles to control the agencies in determining whether to follow the reasoning of a court of appeals' decision in their administration of statutory programs. For the time being, we believe that the question should be left to each individual agency to explore, taking into account any special factors arising under the statute it administers. That course will encourage the agencies to experiment with different approaches and to benefit from each other's experience. 5/ The Committee's consideration of the

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5/ We note, for example, as explained in the April 21, 1988 letter from Ronald Robertson, the General Counsel of the Department of Health and Human Services, that that Department has taken a number of important steps to address the non-acquiescence issue in response to the concerns expressed in the legislative history of the Social Security Disability Benefits Reform Act of 1984, discussed at pages 5-7, supra. The appropriate approach to this issue continues to be the subject of discussions between that Department and the Department of Justice. The recent attention to the non-acquiesence issue -- in Congress, the (Continued)

nonacquiescence issue, including the report prepared by Professors Estreicher and Revesz, will be of considerable assistance to the agencies in their further consideration of the issue. And we would not object to adoption of a recommendation emphasizing what the Committee and the Administrative Conference regard as the most important principles for an agency to take into consideration, as long as it is made clear that the principles are not intended to be exclusive and are not judicially enforceable.

As is evident from the foregoing comments, we agree in general with a number of the judgments in the draft report by Professors Estreicher and Revesz. Those judgments coincide with many of the internal principles and practices that govern the Department of Justice and the Office of the Solicitor General in their supervision of litigation involving federal agencies. What we object to is the formulation of these precepts as litigable legal prescriptions. We would urge the Committee to exercise great caution before endorsing a recommendation that might sanction or encourage a new category of litigation about the very conduct of litigation itself.

Thank you for providing us with the opportunity to comment on the draft report and the tentative draft recommendation.

Sincerely,

Thomas W. Merrill
Deputy Solicitor General

Edwin S. Kneedler
Assistant to the Solicitor General

Senator HEFLIN. Mr. Enoff, we are pleased to have you. Go ahead, sir.

STATEMENT OF LOUIS D. ENOFF

Mr. ENOFF. Thank you, Mr. Chairman. It is a pleasure to be here, and I have with me Ms. Eileen Bradley, who is the Associate Commissioner for Hearings and Appeals at the Social Security Administration.

I, too, Mr. Chairman, with your permission, would like to submit my written statement for the record and proceed with a summary.

Senator HEFLIN. It will be made part of the record.

Mr. ENOFF. Thank you, Mr. Chairman.

Although this is the first time that we, HHS, have testified on this subject, the bill is similar to Senate S. 950 of the 100th Congress, and we submitted a bill report on 950 to Chairman Biden at that time.

We strongly oppose the enactment of S. 594 for many of the same reasons that we expressed in our opposition to the previous bill, because we believe it is unnecessary and would have enormous costs—costs in dollars, in inefficiency, in reduced accountability, and in disruption.

In a few months, Mr. Chairman, the Social Security Administration appeals process will celebrate its 50th anniversary. Over half a century, SSA has provided the American public a fair and full opportunity to pursue their claims for benefits.

No administrative agency can maintain its credibility with the public unless its process provides for basic fairness and efficiency. We have been very concerned, Mr. Chairman, that the enactment of S. 594 would severely curtail our ability to serve efficiently the public, and thus erode the public's confidence in the Social Security program.

I wanted to briefly address the two primary purposes for establishing an independent ALJ corps that you cited when you introduced the bill on March 15th: one, to ensure the decisional independence of ALJ's and, two, streamline the Federal administrative system.

First, regarding independence, like all other Federal agencies, our ALJ's are appointed pursuant to the APA. We hire ALJ's through the Office of Personnel Management's process and have no say in their compensation. We may take no adverse action against them, only in the case of good cause after it is established through a hearing before the Merit Systems Protection Board, and so forth.

In short, in terms of decisional independence, our ALJ's are no different than any other Federal ALJ's. Our experience mirrors that of other agencies; namely, the protections afforded to ALJ's to ensure their impartiality in deciding cases have worked for these 50 years.

With regard to streamlining the Federal administrative system, although I have very serious doubts that creating a new bureaucratic would streamline or improve administrative efficiency anywhere in the Government, I am absolutely certain that it would not have that effect in regard to the Social Security appeals process.

As you know, Mr. Chairman, our ALJ's comprise about 70 percent of all the ALJ's in the Federal Government. The reason for that is simple. We administer the largest adjudicatory system in the Nation. Each year, we adjudicate over 5 million claims for benefits; 1.5 million of these involve the disability program.

Although the vast majority of claims are resolved before they ever reach the hearing level, in fiscal year 1988 we received more than 290,000 new requests for hearings, most of them involving disability, but an increasing number relating to Medicare.

The sheer magnitude of the SSA adjudicatory system has serious implications for this bill, Mr. Chairman. Transferring hundreds of thousands of claims files between Social Security and the new independent ALJ corps will likely result in longer processing times for claimants, and also in the potential for more lost files.

With regard to accountability, finally, I would say that the significant decrease in accountability that would result if this bill were enacted would be with the public for efficient and timely processing of their appeals, accountability to the President and the Congress for all aspects of program administration, and accountability to the courts.

Inserting an independent administrative judiciary in the midst of the executive branch's decisionmaking function will not only create administrative havoc; we believe it will also diffuse accountability and undermine the integrity of the process in the eyes of those it is intended to serve.

In sum, we believe that the bill will create far more problems than it will solve. We believe that the current system works and we are committed to making any improvements needed to continue to assure a fair and efficient ALJ process.

Separating adjudicators from the agency heads who are responsible to the President, to the Congress, and to the public for administering Federal programs will reduce public service, diffuse accountability, and create conflict between adjudicators and policymakers, all in the name of enhancing the perception of independence.

We believe this bill erects bureaucratic barriers to efficient and timely case processing, and those barriers will make it difficult, if not impossible, to affix accountability. A system that loses its accountability soon loses credibility with those it is intended to serve.

For all of these reasons, the Department of Health and Human Services strongly opposes S. 594.

Thank you, Mr. Chairman. I would be pleased to answer any questions you may have.

Senator HEFLIN. Thank you for finishing during the yellow time period.

[The prepared statement of Mr. Enoff and answers to questions submitted by Senators Heflin and Metzenbaum follow:]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration
FOR RELEASE ONLY UPON DELIVERY

Refer to:
Baltimore MD 21235

Statement

By

Louis D. Enoff
Deputy Commissioner for Programs
Social Security Administration

Hearing on S. 594, A Bill to Establish
an Independent ALJ Corps

Senate Committee on the Judiciary
Subcommittee on Courts and Administrative Practice

June 13, 1989

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear today to provide the views of the Department of Health and Human Services (HHS) on S. 594, a bill to establish an independent Administrative Law Judge (ALJ) Corps.

Although this is the first time that we have testified on this subject, the bill is similar to S. 950 of the 100th Congress, and we submitted a bill report on S. 950 to Chairman Biden.

We strongly oppose enactment of S. 594 for many of the same reasons that we expressed in opposing S. 950. In a few months, Mr. Chairman, the Social Security Administration's (SSA) appeals process will celebrate its 50th anniversary. Indeed, some 6 years before the enactment of the Administrative Procedure Act (APA) in 1946, the Social Security Act authorized, and the original Social Security Board created, an appeals process that was the model of the APA. Over those 50 years, SSA has provided the American public a fair and full opportunity to pursue their claims for benefits. No administrative agency can maintain its credibility with the public unless its processes provide for basic fairness and efficiency. We are very concerned, Mr. Chairman, that the enactment of S. 594 would severely curtail our ability to serve efficiently the public and, thus, erode the public's confidence in the Social Security program.

I want to address the two primary purposes for establishing an independent ALJ Corps that you cited, Mr. Chairman, when you introduced S. 594 on March 15, 1989--to ensure the decisional independence of ALJs and to streamline the Federal administrative system.

ALJ INDEPENDENCE

Because other testimony addresses ALJ independence, I will address it only briefly, Mr. Chairman. Like all other Federal agencies, our ALJs are appointed pursuant to the APA. We hire ALJs through the Office of Personnel Management's process and have no say in their compensation, may take adverse action only if good cause is established after the opportunity for a hearing before the Merit System Protection Board, and so on. In short, in terms of decisional independence, our ALJs are no different than other Federal ALJs. Our experience mirrors that of other agencies--namely, the protections afforded ALJs to ensure their impartiality in deciding cases have worked for years.

The perception of greater independence that the bill seeks to enhance carries with it enormous costs—in dollars, inefficiency, and reduced accountability to the public, and it is in that area I want to focus my remarks.

STREAMLINE THE FEDERAL ADMINISTRATIVE SYSTEM

Although I have very serious doubts that creating a new bureaucratic structure would streamline or improve administrative efficiency anywhere in Government, I am absolutely certain that it would have the exact opposite effect for SSA.

As you know, Mr. Chairman, our ALJs comprise about 70 percent of all the ALJs in the Federal Government. The reason for that is simple: SSA administers the largest adjudicatory system in the nation. Each year SSA adjudicates over 5 million claims for benefits, 1.5 million of which involve the disability program. Although the vast majority of claims are resolved before the hearing level, in fiscal year (FY) 1988 we received more than 290,000 new requests for hearings, most involving disability, but an increasing number relating to Medicare. In fact, the Omnibus Budget Reconciliation Act of 1986 provided new rights to ALJ hearings in certain Medicare cases, and we expect that the Medicare workload alone will exceed 50,000 cases by FY 1991.

The sheer magnitude of SSA's adjudicatory system has serious implications for this bill, Mr. Chairman. Transferring hundreds of thousands of claims files between SSA and the new independent ALJ Corps will likely result in longer processing times for claimants. It will also increase the likelihood--indeed, inevitability--of lost or misrouted files.

SSA has many initiatives underway to improve administrative efficiency and public service, including a modernized claims system that will include the ALJ hearings and Appeals Council levels of the process. Implementing automated systems initiatives within an agency of SSA's size and scope is difficult; ensuring systems compatibility between independent agencies is far more difficult, and doing so in a program of the size and complexity of Social Security would be, I believe, virtually impossible.

In addition to, and perhaps more important than, the administrative complexities that the independent Corps bill would create are the program and adjudicatory differences between SSA's adjudicatory system and that of other Federal agencies. SSA's process, including the final appeals step, is both informal and nonadversarial. In the original act and over the ensuing years, Congress has made it quite clear that SSA's administrative hearings should be conducted informally. Such formalities as the Federal Rules of Evidence do not apply in SSA's ALJ proceedings, and even when the claimant has an attorney, the ALJ is still responsible for ensuring that the claimant's rights are fully protected and that the record is fully developed.

Thus, in addition to the concerns that have been expressed about the loss of program knowledge that would occur through the loss of ALJ specialization, we are also concerned that the adjudication of Social Security cases would soon become increasingly formal. Under the bill, the Corps may establish its own rules and procedures 2 years after enactment. Those procedures may suit the needs of the independent Corps, but not necessarily the needs of Social Security claimants.

ACCOUNTABILITY

Finally, Mr. Chairman, I want to address the significant decrease in accountability that would result if the bill were enacted--accountability to the public for efficient and timely processing of their appeals, accountability to the President and Congress for all aspects of program administration, and accountability to the courts. Inserting an independent administrative judiciary in the midst of the executive branch's decisionmaking function will not only create administrative havoc, it will also diffuse accountability and undermine the integrity of the process in the eyes of those it is intended to serve.

First, ALJs do not now establish agency policy; rather, on behalf of the Secretary, they apply agency policy to the facts presented in a particular case. Consistent and uniform application of policy is difficult in the best of circumstances, especially in a complex and subjective program like disability; totally separating adjudicators from policymakers, however, simply invites disputes between adjudicators and policymakers over policy interpretation and makes the resolution of those disputes more difficult. The result is an inevitable decrease in accountability for program policy.

Second, under the present system, accountability for service to the public is clear. In SSA's massive system, where millions of claims files move among various processing components around the country, processing is not always as speedy as we would like, but we are clearly accountable to the public and the Congress. Under the bill, however, that accountability would be shared between SSA and the independent ALJ Corps, and shared accountability is often no accountability at all.

Last, the adjudicatory process does not stop once an ALJ makes a final decision and the agency head adopts it. Social Security claimants file approximately 12,000 civil actions in court each year, and we receive about 5,000 court remands a year, most of which must be remanded to an ALJ for further proceedings. Most courts maintain these cases on their dockets pending the outcome on remand, and some courts impose strict deadlines for

processing a remand. It is unclear under the bill who would be accountable for meeting those deadlines--the agency, the independent ALJ Corps, or both.

Our concerns are such, Mr. Chairman, that we would have to consider significant modifications to the adjudicatory process for Social Security cases if S. 594 were enacted. For example, we would have to consider new procedures to ensure that decisions rendered by ALJs in the independent Corps complied with agency policies and would be defensible if appealed to court.

CONCLUSION

In sum, Mr. Chairman, we believe that the bill will create far more problems than it will solve. We believe that the current system works well, and we are committed to making any improvements needed to continue to assure a fair and efficient ALJ process.

Separating adjudicators from the agency heads who are responsible to the President, the Congress, and the public for administering Federal programs will reduce public service, diffuse accountability, and create conflict between adjudicators and policymakers, all in the name of enhancing the perception of independence. The bill erects bureaucratic barriers to efficient and timely case processing, and those barriers will make it difficult, if not impossible, to affix accountability. A system that loses its accountability soon loses credibility with those it is intended to serve. For all these reasons, HHS strongly opposes S. 594.

This concludes my testimony. I will be happy to answer any questions you may have.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to:

Baltimore MD 21235

JUL 0 3 1989

The Honorable Howell Heflin
Chairman, Subcommittee on Courts
and Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Heflin:

Enclosed are the Social Security Administration's (SSA) responses to questions from both you and Senator Metzenbaum for the record of the June 13, 1989, hearing. To facilitate your review we have followbd the question format of your letter.

We appreciated the opportunity at the subcommittee hearing to provide SSA's position on S. 594, a bill to establish an independent corps of administrative law judges. Please contact me if you require any additional information.

Sincerely,

Louis D. Enoff
Deputy Commissioner
for Programs

Enclosure

Questions from Senator Heflin

1. You indicate in your testimony that SSA has many initiatives underway to improve administrative efficiency and public service. However, you fail to elaborate on this statement. Would you please give the subcommittee some idea of the changes you propose?

As I indicated in my statement submitted for the record, SSA does have many initiatives underway to improve efficiency and public service, including a modernized claims system that will include the administrative law judge (ALJ) and Appeals Council (AC) levels of the process. To modernize the claims system, SSA is continuing with its implementation of our Systems Modernization Plan. SSA has now implemented this plan for the initial intake process in our field offices. As implementation of the automated claims system is expanded, SSA's hearings offices around the country will be included in this system. This will mean that claims file data will be accessible electronically, thereby reducing the time spent in the current manual transfer of files. The automated claims system will also enhance the internal control and management of the hearings workload.

I think it would be useful to focus on several major initiatives in the Office of Hearings and Appeals (OHA) regarding the appeals process to provide the committee with additional information to assist with its evaluation of ALJ Corps legislation. OHA has established four goals to guide its operations:

- to improve the quality and legal sufficiency/defensibility of the Secretary of Health and Human Services' decisions;
- to improve OHA's quality and timeliness in service to the public;
- to improve OHA's internal management and administrative effectiveness and efficiency; and
- to develop and maintain a favorable work environment that recognizes employees as valuable Agency assets.

To achieve the second and third goals, OHA has a number of service improvements and efficiency initiatives underway which are directed at the ALJ appeals level. OHA has allocated new computer equipment to its field offices and has designed and implemented a new Hearings Office Tracking System which provides Hearings Office Chief ALJs and other managers with more accurate and timely administrative and case processing information.

In addition, OHA has instituted a number of case processing initiatives at the hearings level to improve service and efficiency. To address the problem which many Federal agencies face in competing with the private sector to attract and retain qualified clerical personnel, OHA has established Word Processing Centers in areas of the country where Federal pay scales are competitive. Using OHA's electronic mail system, staff in these centers type draft and final ALJ decisions for other offices.

OHA has also initiated several innovative projects to address heavy concentrations of work in selected areas of the country and to test new case processing methods. In these projects, OHA has brought together in a single location the staff who perform key case processing functions--hearings assistants who perform prehearing case preparation and development functions, decisionwriters who draft decisions for ALJ review, and legal clerks and typists. The staff at these sites are able to provide support to ALJs at various locations within a State or region.

OHA is also designing pilot projects to test the effect of greater use of prehearing conferences with claimants and/or their representatives. Under the auspices of the ALJ assigned to a case, a senior staff attorney may conduct a prehearing conference to define and narrow the issues, reach agreement on facts not in dispute, and identify cases which can be resolved without the need to go to a hearing.

2. You indicate that one of the concerns of SSA is the possible loss of expertise of ALJs--

Could you explain the appeals process for Social Security cases?

In adjudicating an application for Social Security benefits, a claims representative in our field office makes the initial determination in all nondisability cases; for cases involving disability, a team composed of a disability examiner and a physician in a State disability determination service (DDS) makes the initial disability determination. If dissatisfied with that determination, the claimant may request reconsideration, the first step in the appeals process (at this, and each step in the appeals process, the claimant has 60 days from the date that he/she receives the notice of prior determination to appeal).

At the reconsideration step, a different claims representative (or team in the DDS) reviews the file again (including any new evidence submitted by the claimant) and makes another determination. If dissatisfied with the

reconsideration determination, the claimant may request a hearing before an ALJ.

If the ALJ detects an error while reviewing the file (or the claimant submits additional evidence with the request for hearing which obviates the need for a hearing), the ALJ may issue a decision on the record. In most cases, the ALJ will schedule and conduct a hearing, offering the claimant and representative an opportunity to call witnesses, question any medical or vocational expert called by the ALJ, and present arguments. If the claimant is dissatisfied with the ALJ's decision, he may request review by the AC, the last step in the administrative appeals process.

The AC considers all requests for review, and will grant review and assume jurisdiction if it finds an error of law, a violation of due process, an issue with broad policy implications, or a lack of substantial evidence to support the ALJ's decision. The AC may also review a case on its own-motion. If the AC declines to grant review, the ALJ's decision becomes the final decision of the Secretary. If the AC assumes jurisdiction, it may remand a case to an ALJ for further proceedings, or issue its own decision affirming, modifying, or reversing the ALJ's decision. In that case, the AC's decision becomes the final decision of the Secretary.

Are the individuals on the AC attorneys?

All members of the AC are GS-15 attorneys. They are selected under normal civil service procedures and adjudicate cases under direct delegation of authority from the Secretary of HHS to ensure their decisional independence.

Are there other individuals, such as analysts, who prepare cases for the AC?

The AC has a staff of approximately 200 hearings and appeals analysts who review cases and provide recommendations to members regarding whether or not the Council should undertake review. In addition, OHA recently established an appeals officer position to assist AC members. These appeals officers are GS-14 attorneys who act, in effect, as magistrates for individual AC members.

Are these individuals attorneys?

Some AC analysts are attorneys, but most are not.

Does this not raise a question of expertise?

No, we do not believe that the nonattorney status of these analysts adversely affects AC support functions. The analysts provide program policy expertise to the AC on the whole panoply of issues in the Social Security and Medicare programs. The majority of cases at the AC level raise program issues--whether the ALJ's decision is based on substantial evidence on medical and vocational matters. Although the nonattorney analysts are also very experienced in assessing more traditional "legal" issues (e.g., due process, etc.), AC members also have the advice and assistance of AC attorneys when needed.

3. How many disciplinary actions has SSA initiated against ALJs? What years? What were the reasons for seeking disciplinary action?

During the last 5 years, the Associate Commissioner for Hearings and Appeals has filed nine complaints against eight different ALJs with the Merit Systems Protection Board. These complaints have involved infractions or violations of the standards that apply to all Federal employees (e.g., misuse of government mail or sexual harassment) or conduct which diminishes the trust and confidence necessarily vested in the incumbent of a responsible and critical position, such as an ALJ.

4. I understand that in March of this year you testified before Congressman Frank and the House Subcommittee on Administrative Law and Governmental Relations. I also understand that he sought specific answers to a number of questions which he submitted in writing to you following that hearing. One of those questions was whether OHA is keeping statistics regarding the reversal rates of individual ALJs. What was your response to Congressman Frank? If these statistics are being kept, why is it necessary to monitor reversal rates?

As we indicated in response to Congressman Frank's May 9, 1989, letter and in testimony before the House Subcommittee on Administrative Law and Governmental Relations on June 27, 1989, SSA does not use allowance or denial rates to monitor individual ALJ performance, nor do we currently produce reports containing such allowance or denial rates for individual ALJs.

At one time, we did use individual ALJ allowance rates to select ALJ decisions for own-motion review by the AC. SSA discontinued this practice in 1984 and since then has made no use of the data. Nevertheless, such data was routinely

included in two recurring systems reports. These reports had to be released in response to requests filed under the Freedom of Information Act (FOIA).

When the current Associate Commissioner for Hearings and Appeals took office over 2 years ago, she initiated a review of OHA's data collection and reports to ensure that OHA collected and reported only useful and necessary information. This review resulted in the elimination of a number of reports, including the two discussed above, which were terminated in mid-1987 and February 1989, respectively. Because both reports are no longer produced, they will not be available to the public under the FOIA.

Questions from Senator Metzenbaum

1. On what basis and how often are administrative judges evaluated?

ALJs are appointed pursuant to the Administrative Procedure Act (APA). Under the APA, ALJs may not be evaluated on the performance of their duties, and thus, we do not evaluate them. Further, SSA has always guaranteed the decisional independence of ALJs as part of its commitment to provide and protect claimants' due process rights.

2. What are SSA's internal policies with respect to a judge's "reversal rate" and what, if any, role does it play in a judge's evaluation or continued service as an ALJ?

SSA does not use allowance, denial, or reversal rates to monitor individual ALJ performance nor do we currently produce reports containing such rates for individual ALJs. As noted in response to question 1 above, we do not evaluate individual ALJ performance.

3. What are SSA's internal policies with respect to "statistical processing time" and what, if any, role does it play in a judge's evaluation or continued service as an ALJ?

We monitor case processing times in a variety of ways. We track the average processing time to complete actions on cases, the average age in days of pending cases, and the number and percentage of old cases. We use these data as part of our continuing responsibility to effectively manage the hearings and appeals process and to identify any case processing problems or workload imbalances which may indicate the need to reassess staffing patterns or reallocate service areas. We also monitor the dockets of ALJs with old cases to determine whether the ALJ needs additional assistance from the support staff to process cases. We may temporarily suspend assigning cases to an ALJ who has a high and growing number of old cases to allow the ALJ to concentrate on deciding and issuing decisions on those cases. However, we do not evaluate individual ALJ performance.

4. It has been suggested that the Agency's judges suffer from low morale and lack of confidence in the Agency's ability to properly support or maintain a system of fairness to the claimants or the judges. It has been further suggested that the removal of the judges from SSA and placing them in a separate unified independent corps would help to solve these problems. Please comment. What steps have been taken to find out why morale is low and what has been done to improve

the situation? Has morale improved? If not, why not? (Please discuss any surveys or questionnaires that might have been used and the results of such instruments.)

We are not aware of any evidence which indicates that SSA's ALJs suffer from "low morale" or lack confidence in the Agency's ability to provide a fair appeals process. For nearly 50 years, SSA has guaranteed the independence of ALJs in their decisionmaking and never attempted to influence the outcome of any hearing. SSA remains fully committed to providing and protecting claimants' rights to a full and fair hearing before an impartial decisionmaker.

The General Accounting Office (GAO) has conducted the only survey we are aware of that addresses this question. On February 10, 1989, GAO reported on the results of a survey of SSA's managers and employees (Social Security: Views of Agency Personnel on Service Quality and Staff Reductions, HRD-89-37BR). GAO found that ". . . (Hearing Office) Chief ALJs and employees (hearing assistants and clerks) of SSA's Office of Hearings and Appeals had a positive perception of the quality of their offices' service to the public and job performance." GAO also found that ". . . the number of Chief ALJs who viewed their offices' performance as improving rose from 39 percent in 1986 to 51 percent in 1988." With regard to hearing assistants and clerks, GAO stated that "employees in the Office of Hearings and Appeals also had a positive view of their work. Of employees responding to our survey, 87 percent stated that the quality of their work was good to very good."

In addition, SSA's data do not reflect any significant change in the turnover rate among ALJs; it has remained at or about 7 percent a year in recent years. Nor has SSA had any difficulty in attracting candidates to the ALJ position. The Office of Personnel Management has hundreds of interested candidates for ALJ positions with the Federal Government and has always been able to refer as many candidates to SSA as we need to fill our positions. Thus, we do not believe the allegations of "low morale" among SSA's ALJs have any basis in fact.

Senator HEFLIN. Mr. Enoff, in your written statement you state your concerns, as such, that we would have to consider significant modifications to the adjudicatory process for Social Security if S. 594 were enacted. That is a rather strong statement that I am sure will interest many members of Congress.

What changes would you make in the adjudicatory process, and are you suggesting that the hearings held by administrative law judges of the Social Security Administration are not hearings covered by the Administrative Procedures Act?

Mr. ENOFF. Well, I did not intend to suggest that. I think the question of the Administrative Procedures Act coverage has been raised before. And, certainly, as I indicated, our judges are appointed under the Administrative Procedures Act and, we think, have all benefits with regard to that.

Of course, the Social Security Act came before the Administrative Procedures Act, so I guess there has never been a firm decision on that. And I am not sure quite what the difference would be if I said it one way or the other, but we believe that persons receive a fair hearing under the Social Security process.

What I was reflecting there, Mr. Chairman, was a concern that with an independent corps making these hearing decisions that this is not necessarily the final decision and that we would have to provide for a review of those decisions in terms of potential court cases, as well as the policy implications and the appeals council review that occurs now.

I have not sat down and figured out exactly how that might be done, but it would create for us a concern of how that review could take place and how we would have to change the process that exists currently.

Senator HEFLIN. One of the concerns raised by the administrative law judges is the unwelcome position of being asked to sometimes decide between agency policy and the letter of the law.

In that situation, how would you have the administrative law judge rule?

Mr. ENOFF. Sir, we do everything we can to ensure that the policy of the administration adheres to the law, and when that situation—if a judge would come in regard to that, obviously the law is paramount, but our policies to conform to the law.

Senator HEFLIN. All right, sir.

Senator Grassley, do you have some questions?

Senator GRASSLEY. First of all, I will put a statement in the record, if you would let me. So I would ask unanimous consent to do that.

[The statement of Senator Grassley follows:]

STATEMENT OF SENATOR CHARLES E. GRASSLEY
ON S. 594, THE ADMINISTRATIVE LAW JUDGE CORPS ACT
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
JUNE 13, 1989

MR. CHAIRMAN, YOU KNOW IT'S SUMMER IN WASHINGTON WHEN THE FLOWERS ARE IN FULL BLOOM, THE TOURISTS ARE IN FULL FORCE, AND THE ALJ CORPS BILL HAS YET ANOTHER FULL HEARING.

TODAY MARKS AT LEAST THE FOURTH HEARING THIS SUBCOMMITTEE HAS HELD, OVER THE PAST FOUR CONGRESSES, ON THIS PROPOSAL. NOTWITHSTANDING MY GREAT PERSONAL REGARD FOR YOU, MR. CHAIRMAN, I AM CONSTRAINED TO REMAIN IN OPPOSITION TO THIS CONCEPT.

I APPRECIATE THAT, OVER TIME, THE BILL HAS BEEN MODIFIED TO TRY TO ACCOMMODATE VARIOUS TECHNICAL PROBLEMS AND CONCERNS. BUT THE VERSION BEFORE US TODAY IS NO LESS RADICAL THAN ITS PREDECESSORS.

IT IS RADICAL BECAUSE IT IS AT ODDS WITH THE FUNDAMENTAL REASON WHY CONGRESS CREATED SPECIALIZED ADMINISTRATIVE AGENCIES IN THE FIRST PLACE. CONGRESS DELEGATED WIDE AREAS OF AUTHORITY TO ADMINISTRATIVE AGENCIES, AND THESE DELEGATIONS HAVE BEEN UPHELD, BECAUSE THE AGENCIES WERE ENVISIONED AS POLICY EXPERTS, IN FIELDS TOO TECHNICAL FOR CONGRESS TO MICROMANAGE. AGENCY DECISIONMAKERS -- INCLUDING ALJ'S -- WERE TO BE A FORUM OF EXPERTS TO RESOLVE DISPUTES THAT WOULD INEVITABLY ARISE.

THE CORPS CONCEPT STANDS THIS VERY PURPOSE ON ITS HEAD. IT IS PREMISED ON THE FACT THAT THESE AGENCY "EXPERTS" ARE MERE FUNGIBLE COMMODITIES.

THOSE WHO WOULD TOSS ASIDE MORE THAN 40 YEARS WORTH OF TRADITION IN THE ADMINISTRATIVE PROCEDURE ACT HAVE A HEAVY BURDEN OF PROOF TO CARRY. THIS BURDEN HAS NOT BEEN MET, IN MY VIEW. IN FACT, THE A.P.A. ALREADY AFFORDS ALJ'S WITH DECISIONAL INDEPENDENCE, AND INSULATION FROM POLITICAL PRESSURES.

IT'S DECISIONAL INDEPENDENCE THAT MATTERS -- RATHER THAN MERE "PERCEPTIONS" ABOUT WHAT BUILDING THE JUDGE HAS OFFICES IN, OR WHETHER THE "SEAL" OF THE AGENCY ADORNS THE BENCH ON WHICH THE JUDGE SITS, AND SO ON.

UNDOUBTEDLY, WE WILL HEAR TESTIMONY CENTERED ON PAST PRACTICES AFFECTING ALJ'S AT THE SOCIAL SECURITY ADMINISTRATION. TO THE EXTENT THAT SSA ENGAGES IN PRACTICES THAT INAPPROPRIATELY LIMIT THE FACT-FINDING ABILITY OF ALJ'S, THIS SHOULD BE REDRESSED BY CONGRESS. BUT SUCH PRACTICES, EVEN

IF THEY STILL EXIST TODAY, DO NOT JUSTIFY AN ACROSS-THE-BOARD DEPARTURE FROM SOUND ADMINISTRATIVE LAW PRACTICES.

I WOULD ALSO NOTE PARENTHETICALLY THAT JUST RECENTLY, A UNANIMOUS SECOND CIRCUIT PANEL, IN THE CASE OF NASH V. BOWEN, DELIVERED A RINGING ENDORSEMENT FOR AGENCY EFFORTS TO ENSURE A REASONABLE DEGREE OF UNIFORMITY, PRODUCTION, AND EFFICIENCY AMONG ALJ'S AT THE SOCIAL SECURITY ADMINISTRATION. THE COURT UNAMBIGUOUSLY HELD THAT AN AGENCY'S REASONABLE EFFORTS TO INCREASE THE PRODUCTION LEVLES OF ALJ'S DO NOT INFRINGE UPON THE ALL-IMPORTANT DECISIONAL INDEPENDENCE.

PROPONENTS OF THE CORPS SUGGEST THAT IT WILL INCREASE EFFICIENCY TO GATHER ALL ALJ'S INTO A SINGLE AGENCY. THIS "CENTRALIZATION" CONCEPT IS ALLURING, BUT IS BASED ON MERE SPECULATION: NO STUDY HAS EVER QUANFIFIED COST SAVINGS TO THE GOVERNMENT.

Senator GRASSLEY. We hear often about the perception of institutionalized bias against the private parties and in favor of the agency where the ALJ is assigned to a particular agency.

This is somewhat, to me, a curious argument coming from the ALJ's themselves, since it seems to assume that the ALJ's can do nothing or don't have the opportunity during the course of proceedings to assure private parties that nothing could be further from the truth.

In any event, could you comment on this perception problem? Is it enough of a reason, if true, to swim against the tide of the last 40 years of administrative procedure, in how we have handled it?

Mr. ENOFF. Absolutely not. think the perception—and I would like to point out, Mr. Grassley, that I don't know how this perception comes about because I know recently we were criticized for trying to get our own persons to become ALJ's. And I asked the staff to look at the record and I find that less than 1 percent of the administrative law judges in Social Security came from anywhere within Social Security. They come from other places. So how they can be determined to be, you know, Social Security-biased is beyond me.

I think that in some ways that is unfortunate. We would like to see more people who understand the process get into the ALJ corps, but I certainly do not believe that that perception bears any truth and would say that we have no reason to change the process.

Senator GRASSLEY. I would like to have your comments on the argument often advanced by those who favor an ALJ corps that the consolidation of all the ALJ's is going to save money.

Mr. ENOFF. As I had indicated in my statement, I believe it will cost money, creating another layer of the bureaucracy. I cannot imagine how this would be more efficient. I have been in the Government 25 years, and I believe we have made some strides in efficiency in various places, but I can't see how that would occur with this bill, Mr. Grassley.

Senator GRASSLEY. Has anybody ever used the argument that you might save money in the sense of somebody being outside the agency, that their decisions might impact upon the total cost of

Government with a supposedly more unbiased view if it is away from the agency?

Mr. ENOFF. You know, our goal within Social Security, within the appeals process that we have, is to get the correct decision at the lowest possible level in that process, and I believe that is the way that we save money by getting to that correct decision as soon as we can, and also as quickly as we can.

And we are in the process of relooking at the administrative appeals process we have to try and make it more efficient, not in terms of necessarily saving money, but particularly in terms of saving time.

Senator GRASSLEY. Mr. Chairman, that is the end of my questions.

Senator HEFLIN. Senator Thurmond.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, we are here today to consider, I believe, S. 594, a bill which would take the more than 1,000 administrative law judges and join them together in one large corps.

Administrative law judges play a major role in the process of administrative adjudication. They are called upon to render decisions in cases ranging from Social Security benefit claims to bank mergers.

The issues surrounding this Nation's reliance on administrative law judges is certainly worthy of the attention of this subcommittee, and I commend Chairman Heflin for his leadership in this area.

Regarding the administrative adjudicatory process, we must ensure that all individuals have a prompt and fair opportunity to bring their cases before the proper administrative authority.

However, I have many concerns about whether this particular proposal will accomplish the goal of improving and enhancing the administrative law adjudicatory process. I anticipate this hearing will closely examine the issues which must be considered before attempting to restructure the current system.

I want to welcome you gentlemen here today, and all the witnesses on these panels here. I have a few questions here. This question, Mr. Valentine, I would propound to you. In your prepared statement, you claim that the creation of a corps of administrative law judges would sacrifice the strengths that have been characteristic of administrative proceedings.

What, in your opinion, are the strengths of such proceedings, and how would they be compromised if S. 594 were enacted?

Mr. VALENTINE. Yes, Senator Thurmond. We believe that, principally, S. 594 would sacrifice three main strengths of the existing process. First, there would be a loss of agencies' control over the substance of their own decisions. We think that that is a very serious problem posed by S. 594.

Second, there would be a loss of flexibility on the part of the agencies in implementing regulatory and policy initiatives. And, finally, there would be, we believe, a serious loss of expertise on the

part of the ALJ's. Even though under the bill there are certain specialized divisions of ALJ's that are set up, it still does not afford the degree of expertise, the degree of specialization that is afforded by the current system.

And, taken together, we believe that these three losses of important strengths of the existing system are very serious indeed and far outweigh any very, very marginal improvement that there would be in any perception on the part of the public of a lack of impartiality.

Senator THURMOND. Mr. Valentine, would the inconsistency of ALJ decisions inherent in the broadening of an ALJ's jurisdiction lead to a greater number of appeals of ALJ decisions?

Mr. VALENTINE. Yes, in my opinion, it would, and I think that subject is addressed in our statement. The new system, we believe, would, in fact, lead to greater inconsistency in decisions between ALJ's and the agencies that they serve. And this, in turn, might well lead to greater litigation in the courts.

Senator THURMOND. Mr. Valentine, will the time it takes to move a case through the administrative process escalate as a result of some ALJ's having to hear disputes regarding issues with which they were previously unfamiliar?

Mr. VALENTINE. Yes, Senator, I think that is also a tendency that would be exacerbated under this bill. The loss of expertise that we have pointed to in our statement would, we think, result in matters taking longer to be decided because ALJ's will be less likely to be specialized, less likely to be experts in the particular matters that come before them.

Senator THURMOND. Mr. Valentine, S. 594 contemplates adding another level of bureaucracy to the administrative adjudicatory process by creating a corps of administrative law judges.

What additional costs, if any, would you expect will be necessary in order to implement the provisions of this bill?

Mr. VALENTINE. Senator, the Department of Justice has not done a very detailed study on that score. But, in general terms, we think that setting up a new entity, a new independent agency within the executive branch, would involve certain overhead and a certain administrative superstructure that would involve greater costs. We do think that this is an additional reason for opposing the legislation.

Senator THURMOND. Mr. Enoff, some assert that administrative law judges at the Social Security Administration are the only ALJ's with problems of decisional independence. Is this a significant problem with ALJ's who hear Social Security issues, and if so, are the remedies currently available under the Administrative Procedures Act sufficient protection for ALJ's?

Mr. ENOFF. I think it is not a significant problem, Mr. Thurmond. As I indicated in my written statement, I do believe that the Administrative Procedures Act does protect the Social Security ALJ's and their decisional independence.

Senator THURMOND. Mr. Enoff, could you provide this subcommittee with some examples of the administrative havoc you believe this legislation would wreak upon your agency as a result of inserting an independent administrative judiciary into the executive branch's policymaking decisions?

Mr. ENOFF. Well, as I alluded to, Mr. Thurmond, with some——

Senator THURMOND. If you would rather supply that for the record, that would be all right.

Mr. ENOFF. Yes. I think it would be a long statement, but with 290,000 potential hearings and those file folders floating back and forth and the schedulings that occur and the discussions that people are used to coming into our local Social Security office and getting status, I believe it would create quite a dysfunction in the process.

I would be glad to supply some more for the record.

Senator THURMOND. If you want to supplement that for the record, we would be glad to have you do so.

Mr. ENOFF. Thank you.

Senator THURMOND. Mr. Enoff, as mentioned in your prepared statement, agencies employ ALJ's from a list of qualified candidates submitted by the Office of Personnel Management.

In your opinion, does this selective certification procedure ensure agency expertise?

Mr. ENOFF. Does it ensure agency expertise, did you say, sir?

Senator THURMOND. Yes.

Mr. ENOFF. Well, we do the training process.

Senator THURMOND. The personnel, you say you obtain them from the Office of Personnel Management, I believe.

Mr. ENOFF. That is correct. The Office of Personnel Management does all of the qualification.

Senator THURMOND. And they would study what they are best qualified for, would they not?

Mr. ENOFF. That is correct, and——

Senator THURMOND. And assign them accordingly?

Mr. ENOFF. That is correct, and then we select from that list according to the rules, and we do the training, then, to ensure that they have the skills and knowledge necessary to understand the Social Security Program.

Senator THURMOND. Mr. Enoff, in the past some have advocated creation of an article I court to hear Social Security cases. Do you believe creating such a court would solve some of the perceived problems in adjudicating Social Security issues?

Mr. ENOFF. Mr. Thurmond, I believe that the creation of some kind of specialized court is worth pursuing, and I would like to again maybe supply some thoughts for the record. But I think that this is an idea that should be explored further. I am not prepared to answer that question officially today, but I do think that there is some merit in exploring that.

Senator THURMOND. I have such admiration and respect for the distinguished chairman here, Judge Heflin, that I hesitate to suggest an alternative, but I think it is well worth looking into if we are going to take any action.

Mr. ENOFF. I agree with you, Mr. Thurmond.

Senator THURMOND. But at present, I don't think I am inclined, unless some evidence is presented otherwise, to favor this particular bill just to have one corps for all the ALJ's.

Thank you very much, Mr. Chairman.

Senator HEFLIN. Yes, sir.

Now, let me ask you, Mr. Valentine, a question about cost. The Congressional Budget Office has been looking into the issue of an

independent corps, and in their preliminary findings they have indicated that up to $20 million could be saved by the establishment of an independent corps.

Have you seen their preliminary findings?

Mr. VALENTINE. No, I have not, Mr. Chairman.

Senator HEFLIN. All right. Let me ask you this other question. You are concerned that the corps would usurp the ability of agencies to formulate agency policy. Administrative law judges are required to follow agency regulation. If, included in this legislation, was a requirement that administrative law judges ought to follow properly promulgated agency policies, would this alleviate the Department's concern about the corps system?

Mr. VALENTINE. I am not sure I understand the question.

Senator HEFLIN. Well, if there was a requirement that they have to follow properly promulgated agency policies, would that alleviate the Department's concern about the corps system as to the issue in regard to usurping the ability of agencies to formulate agency policy?

Mr. VALENTINE. No, I don't believe that it would, Mr. Chairman. Basically, the Department believes that the case has not been made that there is any problem with impartiality of administrative law judges under the existing system. We don't think the case has been made that there is a problem.

ALJ's, of course, now are required to follow agency policies, and we don't think that there is a problem there that would be solved by the creation of a new corps.

Senator HEFLIN. Well, we will submit some questions.

Do you have another question?

Senator GRASSLEY. Not a question, but two things. One, because I have to go to Small Business, I want, for panel two and three, to submit questions in writing.

Senator HEFLIN. All right.

Senator GRASSLEY. And then I would like to have a case for printing in the record, and it is *Nash* v. *Bowen*, and I would like to take just 30 seconds to note that this was a unanimous second circuit panel decision which delivered a ringing endorsement for agency efforts to ensure a reasonable degree of uniformity, production, and efficiency among ALJ's at the Social Security Administration.

It seems to me that the court unambiguously held that an agency's reasonable efforts to increase the production levels of ALJ's does not infringe upon the all-important decision independence.

So I would ask if that could be included in the record.

Senator HEFLIN. It will be made a part of the record.

Senator GRASSLEY. Thank you.

Senator HEFLIN. Well, questions probably will be submitted to each of you in writing and we would appreciate your replies to them.

Thank you.

Mr. ENOFF. Thank you.

Mr. VALENTINE. Thank you, Senator.

Senator HEFLIN. Our next panel is John Vittone, of the American Bar Association, and Mr. John T. Miller, an attorney from Washington, DC.

Judge Vittone, we would be glad to hear from you. If you will, as the others, your written statement will be made a part of the record, and if you will summarize in 5 minutes.

PANEL CONSISTING OF JOHN VITTONE, CHAIRMAN, NATIONAL CONFERENCE OF ADMINISTRATIVE LAW JUDGES, AMERICAN BAR ASSOCIATION, WASHINGTON, DC; AND JOHN T. MILLER, JR., ATTORNEY, WASHINGTON, DC.

STATEMENT OF JOHN VITTONE

Judge VITTONE. Thank you, Mr. Chairman. My name is John Vittone. I am Chairman of the National Conference of Administrative Law Judges of the American Bar Association. I am pleased to appear before this subcommittee at the request of the President of the American Bar Association, Robert D. Raven, to express the ABA's support for S. 594, the proposed Administrative Law Judge Corps Act.

I am particularly gratified to be here today, Mr. Chairman, because this is the first time the ABA has formally urged Congress to create a corps of Federal administrative law judges.

Since 1983, various sections of the ABA have had under consideration the proposal to create a uniform corps of administrative law judges at the Federal level. As a result of those deliberations, the ABA's policymaking body, the house of delegates, adopted a joint recommendation of the judicial administration division, the litigation section, the general practice section, and the tort and insurance practice section to support the enactment of legislation to enhance the judicial independence and efficiency of administrative law judges through the establishment of a governmentwide corps of judges.

The ABA recognizes the critical role played by administrative law judges in the administrative process and believes that it is essential to protect the integrity and independence of these judges in view of the important proceedings over which they preside.

The ABA's resolution of support for a corps contains certain recommendations about the creation of that corps. Those specific recommendations are discussed in detail in my written statement and I will not discuss them here today.

However, Mr. Chairman, the ABA believes that S. 594 meets almost all of the conditions that a corps of administrative law judges should include. Moreover, the ABA believes the establishment of a corps should produce certain benefits to the public which I have detailed in my statement.

Mr. Chairman, there are two specific areas that I would like to address. The first deals with the alleged loss of expertise by administrative law judges if a corps is established. This concern has been voiced in the past and has been addressed here today.

S. 594 addresses those concerns very directly. The corps would be divided into seven distinct divisions. These divisions are based on specific areas of the law and cannot be abolished or consolidated without congressional action.

Judges would be assigned to those divisions after consideration of the area of specialization in which the judge has served. Thus, after

the creation of a corps, judges would continue to hear the same cases over which they preside today.

The judge may hear other kinds of cases in the special area of law assigned to that particular division, but that should not diminish his or her expertise. For example, an NLRB judge assigned to the Division of Labor Relations could also preside over cases that arise at the Federal Labor Relations Authority. These two areas of law are similar and judges at either agency are qualified to preside over cases at the other agency. In the same way, a judge at the Securities and Exchange Commission should also be qualified to preside over a proceeding at the Commodity Futures Trading Commission.

Even today, Mr. Chairman, judges are appointed to the various agencies even though they may not have specific experience in the area of law in which the agency has jurisdiction.

In addition, I think it is important to note that the council of the corps, which is composed of the chief judge and the division chief judges, would not be operating in a vacuum. The council is authorized to assign judges to the divisions and appoint new judges as needed. The council, as a public body, will make such assignments and appointments with the needs of the agencies and the known expertise of the judges in mind.

Finally, with the requirements for continuing judicial education and the restrictions on the council's ability to reassign judges, there should be no loss of expertise at the trial level.

The other area that I would like to address concerns agency review of the initial decisions by judges of the corps, a topic which has been discussed here today, also. S. 594 does not change the agency's jurisdiction to review a judge's decision in the same manner that it does now, nor does the bill alter the judge's obligation to abide by the policy of an agency which has been promulgated in its rules, regulations, procedures, or case decisions.

Each agency would continue to be the arbiter of its own policy, subject only to judicial review. The situation should not change under the corps. The only change would be that the trial judge is not an employee of the reviewing agency.

However, Mr. Chairman, the ABA would not object to the inclusion of specific provisions concerning agency review and the requirement that judges adhere to agency policy in the bill.

Finally, Mr. Chairman, on behalf of the ABA, I wish to express our support for your efforts to improve the administrative judicial system through the creation of a corps of administrative law judges. Our association stands ready to work with you and the other members of the committee, and I will be happy to respond to any questions.

Senator HEFLIN. Thank you, Judge.

[The prepared statement of Judge Vittone and answers to questions submitted by Senators Heflin, Thurmond, and Grassley follow:]

Statement of

JOHN VITTONE, CHAIRMAN
NATIONAL CONFERENCE OF ADMINISTRATIVE LAW JUDGES
AMERICAN BAR ASSOCIATION

Before the

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

In Support of

S.594
THE PROPOSED ADMINISTRATIVE LAW JUDGES CORPS ACT

June 13, 1989

Mr. Chairman, Members of the Subcommittee, I am John Vittone. I am Chairman of the National Conference of Administrative Law Judges of the American Bar Association. I am pleased to appear today at the direction of the President of the ABA, Robert D. Raven, to express the ABA's support for S. 594, the proposed Administrative Law Judges Corps Act. In addition, I am the Deputy Chief Administrative Law Judge at the U.S. Department of Labor.

The views that I expressed here today are on behalf of the American Bar Association, and are not intended to be the opinions of any other organization or agency. I am particularly gratified to participate in this hearing, Chairman Heflin, because this is the first time the ABA has formally urged Congress to create promptly a corps of federal administrative law judges.

Since at least 1933, the American Bar Association has considered at various times the proper role of administrative law judges as hearing officers in the quasi-judicial processes of federal departments and agencies. 1/ Since 1983, various elements of the Association have had under active consideration the proposal to create a unified corps of administrative law judges at the federal level. Consideration of earlier versions of S. 594 have been undertaken by the Judicial Administration Division, Administrative Law Section, Litigation Section, General Practice Section, and the Tort and Insurance Practice Section.

1/ Administrative Law Judges: The Corps Issue, a monograph by Judge Earl Thomas, American Bar Association, 1987, pp. 17-25.

At the 1988 Annual Meeting of the Association, a joint recommendation to the House of Delegates in support of a unified corps was sponsored by the Judicial Administration Division and the Sections of General Practice, Litigation, and TIPS. The recommendation of these sections was adopted by an overwhelming vote of our policy-making House of Delegates.

The resolution affirms that the Association supports in principle the enactment of legislation to enhance the judicial independence and efficiency of federal administrative law judges through the establishment of a government-wide corps of such judges. In addition, such legislation should include appropriate provisions to:

(1) utilize, develop and enhance administrative law judges' expertise in specialized fields;

(2) retain agency review of administrative law judges' decisions;

(3) provide that administrative law judges adhere to the duly promulgated policies, procedures, and priorities of the agencies involved;

(4) provide a fair and effective method of removing, or disciplining an administrative law judge for misconduct or neglect of duty;

(5) provide for the improvement of administrative law judges' performance pursuant to the American Bar Association's Guidelines for the Evaluation of Judicial Performance;

(6) provide for administrative law judges' salaries that are adequate and appropriate to their functions and responsibilities; and

(7) lodge the Administrative Law Judges Corps within the Executive Branch.

The Association has come to recognize the increasingly large and critical role played by administrative law judges in the administrative process. The number of federal administrative judges is nearly twice as large as the number of U.S. District Court Judges. Even excluding the extremely large volume of cases decided by the Social Security Administration, the numbers of cases decided by all other administrative law judges runs into the thousands. Moreover, the variety of controversies subject to the administrative hearing process includes practically every conceivable subject governed by a federal agency or department. Cases presided over by administrative law judges include:

> . . .licensure and route certification of transportation by air, rail, motor vehicle or ship; licensure of radio and television broadcasting; establishment of rates of gas, electrical, communication and transportation services; compliance with federal standards relating to interstate trade, labor-management relations, advertising communications, consumer products, food and drugs, corporate merger and antitrust; regulation of health and safety in mining, transportation and industry; regulation of trading in securities, commodities and futures; adjudication of claims relating to Social Security benefits, workers' compensa-

tion, international trade and mining, and many other matters. 2/

Moreover, Congress continues to enact legislation which requires or provides for hearings before administrative law judges. Such proceedings arise under the Immigration Reform and Control Act of 1986, the Anti-Housing Discrimination Act of 1988, the Polygraph Act of 1988, the Program Fraud Civil Remedies Act, and various kinds of whistleblower legislation. The breath of legislation that provides for hearings before an administrative law judge is staggering. At the Department of Labor, for example, we process almost 15,000 cases annually which can arise under approximately 80 different statutes.

The American Bar Association believes that it is essential to protect the integrity and independence of the administrative law judge in the administrative process in view of the important proceedings over which they must preside. These judges must be impartial fact-finders who decide cases based upon law. At the same time, they must follow the legitimate policy determinations made by the agency or department whose cases they decide. For these and other reasons, the independence of these judges is a vital concern.

2/ Lubbers, Federal Administrative Law Judges: A Focus on Our Invisible Judiciary, 33 ADMIN. L. REV. 109 (1981).

S.594 would separate all administrative law judges from their present agency or department into an independent corps of judges in the Executive Branch. The Corps would be governed by a chief judge and would be divided into seven specialized divisions, with each division supervised by a division chief law judge. The chief judge and division chief judges would be appointed by the President with the advice and consent of the United States Senate.

The chief and division chief judges would form a council that would be the policymaking body of the Corps. The council would have the authority to assign judges to divisions, appoint persons as administrative law judges, prescribe rules of practice and procedure for the Corps, issue appropriate rules and regulations for the efficient conduct of the Corps, and in general be responsible for the Corps' daily operations.

The bill contains explicit protections for the judges of the Corps. Appointments of administrative law judges would continue to be made from a register of qualified candidates maintained by the Office of Personnel Management. In order for a judge to be involuntarily reassigned to a new permanent duty station, the judge must receive a written explanation from the Corps council stating that such a move is required in order to meet substantial changes in workloads. Judges would continue to hear and adjudicate the same types of cases in which they have a developed expertise, and over which they presently preside. Further, judges would continue to be assigned cases within their division on a rotating basis, so far as practicable. In

addition, administrative law judges would be authorized to act as special masters pursuant to Federal Rule of Civil Procedure 53(A).

S. 594 also contains provisions for the removal and discipline of administrative law judges. The bill contains specific protections of judges, and provides that they may not be removed, suspended, reprimanded, or disciplined except for misconduct or neglect of duty. Further, the bill provides for the removal of judges due to physical or mental disability.

Finally, the bill contains provisions for the smooth transition of authority over judges from the federal agencies to the Corps. An important provision of this transition is that within two years of enactment, the bill calls for a study and the submission of recommendations which would further streamline the administrative decision-making process.

The ABA wishes to commend you, Mr. Chairman, for continuing to refine and improve the Corps proposal. The ABA strongly concurs in the need for your legislation. Under the provisions of the bill, all administrative law judges would become part of an independent Corps of judges lodged within the Executive Branch. By dividing the Corps into seven specialized areas, the expertise of judges will be preserved and enhanced. In the divisions, judges will hear cases arising from the same area of law instead of cases solely from one agency. Consequently the judges will continue to be specialists without the loss of expertise. The judges' experience within the divisions will be broadened and there will be more variety within their specialized area, but their expertise will not be squandered.

In addition, it is important to note that S. 594 provides that the Corps Council must establish, after consultation with the agency, programs to assure that judges assigned to hear cases of an agency have the necessary training in the specialized field of law of that agency. This is an important provision and a great improvement over the present situation in which there are very few training programs in specialized areas for judges. Often a newly appointed judge's training is limited to on-the-job training or self-education.

The Association calls for the federal agencies to retain review of judges' decisions and provides that judges should adhere to the duly promulgated policies, procedures, and priorities of the agencies involved. S. 594 does not explicitly contain these provisos, and should be strengthened in this regard. However, Section 587 of the bill does provide that any kind of proceeding "heretofore held before administrative law judges shall be referred to the Corps." Section 587 provides further that judges of the corps shall hear and decide cases subject to section 554 of the Administrative Procedure Act or every case in which hearings are required to be heard in accordance with sections 554 and 556 of the APA. Thus, judges would continue to hear all proceedings and adjudications over which the APA presently gives them jurisdication.

S. 594 would not affect the federal agency's ability or jurisdiction to review a judge's decision in the same manner it now reviews an initial or recommended decision. Nor would it affect the present requirement that judges adhere to the policy

of an agency which has been promulgated in rules, regulations, procedures, or case decisions.

Creation of a Corps will not affect the manner in which a case is initiated at the agency level or reviewed under law by the agency on appeal by the parties or by the agency on its own volition. The only change in the processing of a case is that the presiding judge is not an employee of the agency instituting the proceeding or reviewing the judge's decision. However, if there are persons or agencies concerned with either agency review process or adherence to agency policy, we would not object to explicit provisions in this regard being included in the bill.

The Association further recommends that there should be a fair method for discipling or removing judges for misconduct or neglect of duty. Section 588 directly addresses this question. In addition to being "removed, suspended, reprimanded, or disciplined" for misconduct or neglect of duty, judges may also be removed for physical or mental disability. Further, the bill provides that the Corps Council shall create a Complaints Resolution Board to consider and recommend appropriate action to be taken when a complaint is made against the official conduct of a judge. If the Council decides to take action against a judge, the Council must file a notice of adverse action against the particular judge with the Merit Systems Protection Board. The

procedures for disciplining judges balance the needs of protecting the judge's independence with the need for proper administrative control. 3/

Finally, the Association calls for salaries of administrative law judges to be adequate and appropriate to their functions and responsibilities. S. 594 is silent on the question of compensation for administrative law judges. We voice no opinion here on what level of pay is an appropriate salary for judges of the proposed Corps. However, as the Committee knows, the American Bar Association has been a strong advocate for significantly increased compensation for all judges in the federal system. With specific reference to the administrative judiciary, the House of Delegates at the 1989 mid-year meeting in Denver adopted a resolution calling for a significant increase in pay for administrative law judges and

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3/ The Association also recommends the establishment of procedures for the improvement of a judge's performance in accordance with ABA Guidelines for the Evaluation of Judicial Performance. These guidelines, adopted by the ABA in 1985, cover all judges, state and federal, not just administrative law judges.

members of the Boards of Contract Appeals. In addition, President Raven testified before the Quadrennial Commission in 1988 that the needs of the administrative judiciary should be considered and acted upon by that Commission. In its report to the President, the Quadrennial Commission recommended that Congress enact legislation to increase the salaries of members of the administrative judiciary.

Mr. Chairman, S. 594 meets almost all of the conditions that we believe that a corps of administrative law judges should include. Now, I would like to review what I believe are the benefits of the creation of government-wide Corps.

The creation of a Corps would assure the public, the companies, and the counsel that appear before administrative law judges that hearings before such judges are fair. Often the impartiality of a judge who is also an agency employee is questioned by those who must appear before that judge in an agency proceeding. The judge, as well as his or her support staff, is an employee of the agency that initiated the proceeding or the agency from which the person or company is seeking a benefit or license. At the very least, the appearance of a possible lack of impartiality exists.

The creation of a Corps would clarify the judge's independent status not only with the public, but also with the federal agency and their staffs. Some agencies such as the Social Security Administration, have attempted to influence a judge's decision or question why the judge is not a "team player." Not all agencies have engaged in such conduct, but it

has occurred often enough to raise serious concerns. Just as important, the possibility of such interference exists at any agency in the future. The creation of a Corps would end such conduct and virtually eliminate any possibility that such conduct would occur in the future.

The creation of a Corps would bring about a more efficient use of administrative law judges. The present system divides the management of judges and cases among 29 separate departments and agencies. There is simply no effective way to assign judges in accordance with varying peaks and valleys of individual agency caseloads. As a result, a highly trained expert resource is not being utilized to the best advantage to achieve prompt disposition of administrative proceedings.

In the absence of a Corps, there is no practical method for assigning judges at agencies where caseloads are dwindling to those agencies which have backlogs. There is a "loan program" that operates through the Office of Personnel Management. But, programs to loan judges, agency-to-agency, have encountered several practical problems. Should the lending agency continue to carry the judge on its payroll? How much should the borrowing agency pay as "rent" for the judge? If work suddenly picks up at the lending agency, can it retrieve the needed judge? Moreover, when an agency admits that its own need to hold hearings has diminished to the point that the judges in its employ are available for a loan program, the agency exposes its judges, its attorneys and the rest of its hearing process personnel to reduction-in-force actions and budgetary reductions.

The unified corps will be able to adjust the assignment of judges to cases with better correlation to the various peaks and valleys of individual agency caseloads. This would eliminate agency overstaffing to meet surges in adjudicative activities in order to avoid backlogs and constituent complaints.

We hope a Corps will produce significant cost savings through improved case management and reduced personnel needs. Savings could be achieved by the elimination of replicative facilities and support staffs employed by the 29 separate agencies and department. Travel expenses for judges would be reduced by assigning cases to a qualified judge housed in a regional office instead of a judge based in Washington. In 1988, the Congressional Budget Office found that a Corps could save up to 20 million dollars several years after enactment through the elimination of duplicative facilities, staff, and travel and through improved case management. 4/

S. 594 would permit any federal agency or court to refer any appropriate case to the Corps or to a specific judge to serve as a special master pursuant to Federal Rule 53(a). The ABA has not addressed this particular provision. However, this provision could encourage the federal courts to use administrative law judges as an additional resource. In addition, all federal agencies could use the Corps' judges in any matter desiring a

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4/ The CBO analysis was based on a review of H.R. 2726, the Administrative Law Judge Corps Act, as introduced June 18, 1987. See. Memorandum to Subcommittee on Labor Standards, House Committee on Education and Labor dated March 14, 1988.

decision based on a hearing record. As caseloads become more evenly distributed among the Corps' judges, the Corps should be able to absorb such added duties without incurring added costs.

Finally, it should be noted that S. 594 does not affect the manner in which candidates to be administrative law judges are reviewed and selected. The system now in place for the merit selection of administrative law judges is left intact. The system is unique and should not be weakened in any way. It provides that applicants for administrative law judge positions must submit to rigorous written and oral examinations conducted by the Office of Personnel Management to demonstrate their legal expertise. They are further required to produce proof of at least seven years experience as judges or trial lawyers handling complex cases.

In conclusion, Mr. Chairman, on behalf of the American Bar Association, I wish to express our support for your efforts to improve the administrative judicial system through the creation of a government-wide corps of judges. As I have testified, S. 594 generally is in accord with the Association's call for the establishment of a Corps. The advantages of a Corps of administrative law judges may be summarized as follows:

(1) Improved public perception of the fairness of the administrative process. This would be achieved through full compliance with the requirement that those conducting adjudications must be truly independent and free from any association or personal obligation to any party, in order that every party be afforded due process.

(2) Significant cost savings.

(3) More efficient and flexible use of the administrative law judges presently employed by 29 separate agencies and departments.

(4) Preservation of the merit selection system.

(5) Retention and enhancement of the expertise possessed by administrative law judges.

(6) Increased and better identified availability of administrative law judges to assist all agencies and federal courts.

Finally, I would like reiterate that I do not believe that the bill changes the current decisional relationship between the judges and the agencies. Agency review of a judge's decisions would continue to operate just as its does today. Each agency would remain the final arbiter of its own policy subject only to judicial review as presently provided under the APA. However, we would not object to the inclusions of specific provisions in this regard in the bill.

Again, Mr. Chairman, I want to thank you and the Subcommittee for the opportunity to testify on S. 594. Our Association stands ready to cooperate with you on this important legislation. I will be happy to respond to any question that you or members of the subcommittee may have.

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July 10, 1989

The Honorable Howell Heflin, Jr.
United States Senate
Washington, D.C. 20510

Re: S. 594

Dear Senator Heflin:

Enclosed are the responses of the ABA to the questions asked by you, Senator Thurmond, and Senator Grassley concerning S. 594.

If we can be of further assistance, please call on me at anytime.

Very truly yours,

John M. Vittone

John M. Vittone
Chair

Enclosures

Responses to Senator Heflin's Questions:

1) As I stated in my written and oral remarks, I do not believe that S. 594 will affect an agency's or department's jurisdiction to review a judge's initial or recommended decision in the same manner that a judge's decision is reviewed today. Further, S. 594 would not change the responsibility of the judge to follow in his decisions the policy of an agency which has been promulgated in the rules, regulations, procedures or cases decisions. The only change in the present arrangement would be that the trial judge is not an employee of the agency reviewing the judge's decision. However, as I stated at the hearing, if the question of agency review of a judge's decision is of concern, then a specific provision that requires the judge to adhere to agency policy should be included in the proposed bill. I do not believe that such a provision is necessary, but the inclusion of such a provision, specifically crafted to maintain the status quo, should alleviate the concerns of the agencies.

In the testimony of Mr. Enoff and Mr. Valentine, it is argued that the creation of a corps will invite, if not encourage the judges to disregard agency policy and engage in "de facto policy-making." They do not explain why the judges of a corps would engage in such conduct. In fact, there is no substantial basis for such concerns. Under a Corps the judges would be bound to follow properly promulgated agency policy. But, as stated above, if this is a real concern then an appropriate provision to clearly require the judges to abide by agency policy could be included in the legislation.

2) There is no real basis to argue that the creation of a corps will produce decisions of lesser quality because judges will not have sufficient expertise. The Corps will not operate in a vacuum. Judges will be placed in the division appropriate to their expertise. In my opinion, after the creation of a corps the expertise of judges will be enhanced. They will not be merely specialists in one specific statute, but use their expertise in related cases within the corps' divisions. For example, the Division of Labor Relations would hear cases now heard by NLRB and FLRA judges. The principles of law in both agencies are similar. A judge in that division should be able to preside over a case from either agency without loss of expertise or quality in the decision.

It is instructive to note that loss of expertise is not an issue in evaluating Article III judges who must have expertise in a great range of possibile litigation. If we maintain focus, as does S. 594, on training, evaluation, agency and professional involvement, then loss of expertise or quality of decisions is not an issue.

3) The current "loan program" does not operate in practice as effectively as some corps opponents argue that it does. As I noted in my testimony, there are problems with the willingness of an agency to loan its judges. Also judges are often not willing to be loaned to other agencies.

In my view, the current loan program is replete with inefficiencies. Our experience at DOL demonstrates that borrowing judges often requires extensive negotiations with the agency which is loaning its judges. If the judges are reluctant to be loaned then they may not approach their new work with the

proper attitude. Often, it is very expensive to borrow a judge from an agency which has excess judges since the loaning agency often wants to be reimbursed for the judges salary plus a fixed percentage of that salary to cover overhead expenses.

For example, in 1984-86, DOL borrowed 16 judges from SSA. This "loan" cost DOL over $1,000,000 in reimbursement to SSA and produced only 792 cases for DOL. (For a more detailed discussion of the loan program, see Chief Judge Litt's letter to Senator Heflin dated June 12, 1989.) Recently, I was informed that DOT is considering borrowing judges to handle an increase in its caseload and may pay the loaning agency 120 percent of the borrowed judge's salary.

These costs and the inefficiencies that are part of the loan program do not make it an efficient method to handle variations in agency caseloads. Finally, it should be noted that the loan program does not try to match the expertise of loaned judges with the needs of the borrowing agency. Most borrowing agencies are just interested in obtaining the services of a good judge.

4) The ABA resolution of support for corps of judges provides that there should be a fair and effective method of removing or discipling a judge for misconduct or neglect of duty. S. 594 provides that judges may not be removed, suspended, reprimanded, or disciplined except for misconduct or neglect of duty. In addition, a judge may be removed for physical or mental disability. Thus, S. 594 goes beyond the ABA's resolution by providing for removal for physical or mental disability.

Such actions to discipline a judge can only be taken after the Corps Council has has filed an adverse action against the judge with MSPB. The judge would then have an opportunity for an on the record hearing before the Board.

This procedure is relatively similar to the present situation where MSPB hears cases to discipline judges for "good cause." The only significant change is that the Corps Council would be substituted for the individual agency which now may file charges against a judge.

Perhaps some persons are concerned that the creation of the Complaints Resolution Board within the Corps will establish a "self policing" organization. I do not believe this will happen. The Complaints Resolution Board will provide the council with an internal body to investigate complaints and make independent recommendations to the Council. This body will ensure the judge against whom a complaint has been lodge that a team of his colleagues free of influence from the Chief Judge or Division Chief Judges will conduct a complete investigation into any allegations of misconduct. For non-serious matters, it will provide the Counill with a method of disposing such matters in a fair manner to all parties. For more serious matters, it will enable the Council to be on firm ground if it is necessary to file adverse charges with the MSPB.

It is my understanding that a number of court systems, state and federal, have already adopted similar peer review systems. In addition, at DOL there is already in place a system for peer review of allegations of misconducts against judges. See 48 Fed. Reg. 30843, 52 Fed. Reg. 32973.

RESPONSES TO SENATOR THURMOND'S QUESTIONS

1) I do not believe that the creation of a corps will produce any greater problems of inconsistency between the judges decision and agency policy than may occur at the present time. The ABA believes that the judges of a corps should adhere to the properly promulgated policies of the agency. We do not believe that S.594 will change the judge's responsibility to adhere to agency policy established in rules regulations, procedures, or case decisions. However, as noted in my testimony and in response to Senator Heflin's questions, we would not object to the inclusion of appropriate provisions in this regard.

2) Except for the problems which have been raised with the Social Security Administration and several isolated instances in other agencies, there has not been any general overt pressure to influence the decisions of administrative law judges. While there is no planned or organized pressure on judges, that does not mean that there may not be subtle pressures on a judge. For example, a judge as an agency employee may feel an obligation to give the agency the benefit of the doubt or sense that the agency wishes a decision to go a certain way. Even though such considerations should not be part of a judge's decision, he or she may find it difficult to exclude such thoughts from their decisional process. Further, the public perception of judges as agency employees being too close to their agencies is just as important as a lengthy list of cases involving improper agency pressure.

In several agencies, such as the NLRB and the FTC when its judges staff was larger, judges were often recruited from the staffs of the agency's attorneys in order to take advantage of the attorney's expertise. On one day the attorney may have appeared before the agency's judges or work for its Commissioners as assistants. And on the next day he or she was a judge deciding cases in which former colleagues appeared as staff counsel and the judge's decision was reviewed by former supervisors. I know of no instance in which either the agency or the judge in such situations violated any rules of propriety, but the appearance to the public and to the parties is difficult to explain.

Those of us who have significant years of experience in the administrative process tend to dismiss these questions of appearance as being blown out of proportion. However, to those attorneys or parties without our experience the question can, and often is, viewed quite differently.

3) There was no singular event which provided the impetus for the ABA to support the creation of a corps. Various sections within the ABA have considered the proposal to create a corps since the original introduction of this proposal by Senator Heflin. After consideration of the proposal, the Judicial Administration Division, the Litigation Section, General Practice Section and Tact and Insurance Practices Section endorsed the corps concept and recommended that legislation to create a Corps be enacted.

It should be noted that the JAD represents all judges -- federal and state -- who are members of the ABA not just administrative law judges. In addition, Litigation, General Practice, TIPs, and the JAD represent over 111,000 attorneys and judges who belong to the ABA out of a total membership of 346,000.

There was no reluctance to approve the corps concept, but it was a subject that required careful and deliberate consideration by the ABA's membership. At the 1988 Annual Meeting of the ABA, a joint resolution of the sections named above was approved by the overwhelming vote of the ABA's policy making House of Delegates.

Responses to Senator Grassley's Questions

With respect to the concern about an agency's rules of practice, the ABA resolution does provide that the corps adhere to agency procedures. S.594 does provide that the Council may adopt rules of practice and procedures. Clearly any such action on the part of the Corps would be done through notice and comment rulemaking, and only after listening to the views of the agency involved. It is not reasonable to assume that the corps would alter rules of practice for a proceeding over the reasonable objections of the agency involved.

1) At the 1988 Annual meeting, the Administrative Law Section proffered a resolution very similar to the resolution adopted by the House of Delegates. The JAD and the Administrative Law Section attempted to reach a compromise over the wording of the resolution introduced before the House of Delegates. We came very close, but could not reach final agreement. In fact, the JAD accepted virtually almost all of the Administrative Law Section's proposed language.

Failing to reach an agreement, the JAD, Litigation, General Practice, and TIPs sponsored the resolution adopted by the House of Delegates. The Administrative Law Section offered its own proposal which differed only slightly in the phrasing of the first paragraph. The Administrative Law Section proposal was rejected by an overwhelming vote.

While we would have liked the Administrative Law Section to support the joint resolution, it is important to note that the ABA's policy is embodied in the joint resolution that was approved and not the Administrative Law Section's proposal. Further, it is also important to note that the Administrative Law Section does support the judicial independence and efficiency of administrative law judges. Finally, while the Administrative Law Section is the principal section that comments on administrative law matters, other ABA sections have a substantial interest in matters falling within the administrative law area. The Administrative Law Section's interest may be more general in nature whereas another section's interest, such as Antitrust, may be more specific. It should also be noted that the four sections that sponsored the Corps resolution have a total ABA membership of over 111,000. The Administrative Law Section has a total membership of about 6,000.

2) The ABA as a body did not express opposition to the concept of a corps in 1985. Just as the Administrative Law Section expressed opposition in 1985, other sections, such as Litigation, General Practice, and TIPs, expressed support for the corps proposal. Further even the proposed resolution advanced by the Administrative Law Section in 1988 did not express opposition to the concept.

Senator HEFLIN. Mr. Miller.

STATEMENT OF JOHN T. MILLER, JR.

Mr. MILLER. Senator Heflin, it is a pleasure to be here today. I accept your invitation to have my prepared comments copied into the record.

I appeared to testify as to an earlier bill. At that time, I found myself in the equivocal position of unable to really endorse it, the reason being I didn't think that sufficient reference was given to expertise and to a system of checks and balances.

I think the bill now before us meets my basic objections. In the first place, it does provide the opportunity for real career service for the ALJ's which they do not now have. I know there is talk about the difficulty of removing them, their independence, and so on.

But in my statement, I have given you some figures from the Office of Hearing Examiners which show that, for example, the Interstate Commerce Commission went from over 100 judges to 3 today. And as a result, those judges had to be released, and whether they were employed again as judges depended on the happenstance of whether some agency wanted them or a vacancy was available. The corps should avoid that kind of disastrous consequence when the needs of the Federal service change the needs for judges in particular areas.

Now, as to expertise, the assignment to divisions ought to meet that requirement. The idea that judges should have the expertise before being appointed is, in my opinion, a bad bit of advice.

Take the ICC, for example, the Interstate Commerce Commission. They required 2 years of transportation law experience before they appointed their judges. Then they reduced the force to three. That meant the rest of the Government had to take judges with 2 years of transportation law experience which is probably of no use whatsoever to them in their new service.

But I think the present system of divisions and the requirement for continuing legal education ought to make the judges in the corps able to turn their talents where they are needed, as they are needed, and with the qualifications needed.

Lastly, the reference to discipline and removal is something I believe is salutary. Ten years ago, the administration tried to meet a perceived lack of public confidence in the procedures by appointing judges for limited terms. We thought that anathema; it was wrong and eventually the proposals were dropped.

But I think there is still that concern in the public's eye that you have got to do something more definite for the disciplinary removal of judges who are simply not measuring up to what is intended. So on these accounts, Your Honor, I think the bill is good.

The fact that a third of the judges are now eligible for retirement and another third will be eligible in the next 5 years makes this a particularly good time to be considering a reorganization of the way in which they are used throughout the Federal service.

I don't think the decision on this bill ought to be made on the basis of what is needed this day or next week or this year, but to prepare us for the next 40 years of the administration of the APA.

Senator HEFLIN. Thank you. We appreciate your testimony.

[The prepared statement of Mr. Miller and answers to questions submitted by Senators Thurmond and Heflin follow:]

STATEMENT OF
JOHN T. MILLER, JR.

BEFORE THE
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
S.594, THE ADMINISTRATIVE LAW JUDGE CORPS ACT
101ST CONGRESS, 1ST SESSION

JUNE 13, 1989

Mr. Chairman and Members of the Subcommittee:

My name is John T. Miller Jr. I appreciate this opportunity to appear before you and to testify in general support of S.594.

I am a lawyer with over thirty-five years of practical experience in the field of federal administrative law. My office is at 1001 Connecticut Avenue, N.W., Washington, D.C. 20036. I am a former chairman of what is now called the Section of Administrative Law and Regulatory Practice of the American Bar Association and am currently President-Elect of the Federal Energy Bar Association. I have been an adjunct professor at Georgetown University Law Center for thirty years. However, I am not appearing today as a representative of any of those institutions. I am testifying on my own behalf.

My experience with the recruitment and appointment of administrative law judges goes back to the 1960's when, for several years, I acted as liaison between the American Bar Association and the Civil Service Commission in connection with the Commission's program for recruiting and examining candidates for appointment as Hearing Examiners, now called Administrative

Law Judges (ALJs), under the Administrative Procedure Act (APA). As a member of panels appointed by the Commission, I interviewed a large number of lawyers seeking to become ALJs. This experience prompted me to write several articles evaluating the Commission's programs and urging reforms. 1/ For ten years I lectured at seminars given for federal and state administrative law judges at the National Judicial College in Reno, Nevada.

I have previously testified before committees of the House of Representatives and the United States Senate on proposed legislation affecting the role of the ALJs. 2/

1/ See "The Civil Service Commission's New Hearing Examiner Program," 17 Ad. L. Rev. 104 (1964); "The need for improvements in the Hearing Examiner recruitment program of the Civil Service Commission," 19 Ad. L. Rev. 319 (1967); "The vice of Selective certification in the appointment of hearing examiners," 20 Ad. L. Rev. 477 (1968); "Continuing legal education of lawyers in federal service and the Federal Administrative Justice Center Proposal," 115 Cong. Rec. E661 (1969), 21 Ad. L. Rev. 267 (1969); "The Administrative Conference of the United States, Hearing Examiners and Continuing Legal Education," 22 Ad. L. Rev. 617 (1970); "CLE for the Government Lawyer: the proposed Federal Administrative Justice Center," 24 Ad. L. Rev. 355 (1972), D.C. Bar Journal, 1973; "The education and development of administrative law judges," 25 Ad. L. Rev. 1 (1973).

2/ Four appearances in 1979 and 1980 related to legislative proposals to limit the tenure of ALJs. I appeared before two committees of the United States Senate to testify on S.262 and S.755: on June 5, 1979 before the Committee on Governmental Affairs and on July 26, 1979 before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary. On January 29, 1980 I testified before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary on H.R. 3263 and H.R. 4233, and on April 17, 1980 before the Committee on Post Office and Civil Service of the House of Representatives on H.R. 6768. On September 5, 1980 I testified before the Consumer Subcommittee of the

More than forty years have elapsed since Congress enacted the APA creating this unique federal judiciary. The Civil Service Commission and its successor, the Office of Personnel Management, have undertaken meaningful reforms during the intervening years to improve the quality of candidates appearing on the registers from which ALJs are appointed. 3/ No comparable reform has been effected to assure that the ALJs, after appointment, remain part of a career judicial service.

Are essential reforms in the way in which ALJs are employed needed today? If they are, is the proposed Administrative Law Judge Corps (ALJ Corps) the appropriate vehicle for reform? I think that each question can be answered in the affirmative. Here are my reasons.

Committee on Commerce, Science and Transportation of the United States Senate on the administrative law judge system. On September 20, 1983 I testified before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary of the United States Senate on S.1279, an earlier proposal to create an Administrative Law Judge Corps.

3/ See Sharon and Pettibone, "Merit selection of federal administrative law judges," 70 Judicature 216 (1987); Mans, "Selecting the 'hidden judiciary': how the merit process works in choosing administrative law judges (Part II), 63 Judicature 131 (1979); Macy, "The APA and the Hearing Examiner: products of a viable society," 27 Federal B. J. 351 (1967). The change in title from Hearing Examiner to Administrative Law Judge, effected first by the Civil Service Commission and then by Congress, did much to improve the quality of applicants.

1. Reemployment of Redundant ALJS.

ALJs are recruited on the premise that they are entering upon a career judicial service. One of its most attractive features is the independence which the APA protects and the courts, departments and agencies generally respect. That independence is vulnerable to attack, however, at its roots.

The present system does not afford even the most conscientious ALJ the assurance of a life-time, judicial career. Without any change in statute, a department or agency may make the role of one of its ALJ superfluous by rulemakings that replace optional adjudications; by paper hearings in rate cases in lieu of hearings before an ALJ; and by the vigorous promotion of settlements. Congress has reduced the need for ALJs in some sectors of the government by enacting deregulation legislation. The employment of ALJs by certain departments and agencies has dropped dramatically in the past twenty-five years, as the following data demonstrate:

	Number of ALJs employed 4/		
Agency	1962	1983	1989
Interstate Commerce Commission	125	11	3
Civil Aeronautics Board	24	4	0
Federal Maritime Commission	15	6	3
Federal Trade Commission	22	8	3
Department of Interior	21	9	7

4/ Data are from the Office of Administrative Law Judges of the United States Office of Personnel Management.

I understand that in one year, 1982, approximately 40 ALJs lost their jobs due to reductions in force. Most found employment as ALJs at a lower pay grade with another agency. Two retired. One returned to private practice.

I do not refer to this experience to argue that ALJs should not be released from assignments when and where they are no longer required to conduct hearings. ALJs must expect to go where their services are needed, whether that takes them intellectually to new areas of the federal administrative process, or physically to different parts of our country. But Congress has yet to face up to one consequence of creating and employing this unique judiciary. No governmental body has yet to be assigned, by legislation, the responsibility for and the means requisite to meaningful immediate, alternative employment of ALJs.

The proposed ALJ Corps can cope with the problems of ALJ redundancies and, thereby, promote a better career service. Under the bill the ALJs are assigned to divisions. Their continued services as judges need not be dependant on the hearing calendar of a single agency. The ALJ Corps will be able to direct the talents of all ALJs to where the work-load is. There will be no need for agencies to engage in make-work projects in order to retain ALJs temporarily not fully employed. There will be little occasion for ALJs to expand their decision-making processes to fill otherwise idle time.

2. Continuing Legal Education.

At the present time each department and agency determines whether funds will be provided for the continuing legal education of its ALJs. At a time when the judiciary throughout the nation has come to recognize the value of such education in terms of more effective and efficient administration of justice, there is an obvious deficiency in the opportunities and funding of continuing education for ALJS. This is apparent from the small enrollment of federal ALJs in the programs sponsored by the National Judicial College.

One of the specific responsibilities of the Council of the Corps is "to establish, after consulting with an agency, initial and continuing educational programs to assure that each administrative law judge assigned to hear cases of an agency has the necessary training in the specialized field of law of that agency". (§565(d)(11)) Through enactment of S.594, Congress will express its support for such education and training and its willingness to provide the funds necessary for the purpose. This is a very constructive step.

Prior to 1984, too much emphasis was placed on the importance of appointing as ALJs lawyers with expertise in the law and procedure of the particular employing agency. 5/ No

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5/ OPM wisely did away with this practice, known as selective certification, when it reformed its recruitment and appointment procedures and standards in 1984. See Miller, "The vice of selective certification in the appointment of hearing examines," note 1, supra.

lawyer should be appointed an ALJ who lacks the energy, intellect and discipline to acquire needed expertise. A client expects no less from any good lawyer. To sacrifice intrinsic qualities of character, competence and judicial temperament for a temporary advantage in the form of expertise in a narrow field of the law is simply a poor bargain. Initial expertise is sometimes illusory and, in the face of a rising tide of laws and regulations and case decisions, evanescent unless kept up to date.

The demand for expertise can be given whatever respect it requires by appointing judges to new tasks early enough to allow time for necessary study and continuing legal education programs. As I noted earlier, no agency appointing an ALJ under the present system provides assurance of a career-long employment. Why should any agency be afforded the right to dictate the credentials of those who enter a judicial service which may well be performed in later years before other departments and agencies?

It has not been in the Anglo-American tradition to appoint lawyers as judges on the basis of a narrow, and, perhaps, temporary expertise. Congress has not demanded such pre-acquired expertise as a requisite to employment as an agency lawyer or appointment as a member of an agency. Nor has specific expertise been a necessary qualification of judges appointed to the federal courts which review agency decisions.

3. Large Numbers of ALJS are Eligible, or soon will be Eligible, for Retirement.

Approximately one-third of the ALJs currently in service are eligible for retirement. Another one-third will be eligible for retirement during the next five years. The willingness of the ALJs to continue on active service is, I believe, an indicator of the satisfaction they derive from their important tasks and the public recognition that goes with it.

The fact that the federal government may lose a large number of its most experienced ALJs during the next few years makes it particularly appropriate that the ALJ Corps be established early enough to benefit from the experience of those ALJs during the transition period. They can assist the Corps in training the large numbers of new judges who must be appointed in the years ahead.

4. The Future Employment of ALJs.

A newly-appointed ALJ may look forward to twenty or more years as a judge. The statistics of the past show that it is difficult to forecast with any degree of accuracy the future needs of particular agencies for ALJs over such a period of time. Each of past four decades has seen not only reductions in the need for ALJs by some departments and agencies but also the enactment of legislation calling for the use of those judges in new areas of the administrative process. The Social Security Administration's requirements for ALJs increased from 186 in 1962 to 812 in 1983, declining to 702 in 1989.

The ALJ Corps offers a much improved flexibility in coping efficiently with similar changes in ALJ requirements in the years ahead.

Before commenting on specific provisions of S.594 I would like to express on the record my agreement with the position of the American Bar Association.

1. Divisions of the Corps (§584(b)). The creation of the seven divisions gives appropriate recognition to the need for expertise in facilitating the disposition of cases decided by ALJs. This will enable the judges to stay in a particular area of administrative practice long enough to acquire needed expertise and put it to use.

The Council will have authority to transfer ALJs among divisions when the changing work-load of the federal government requires such action.

2. Appointment of the Chief Judge and Division Chief Judges by the President with the Advice and Consent of the United States Senate (§584(c)). Under the proposed organization, the Chief Judge and Division Chief Judges will determine policy for the ALJ Corps. (§585) Should they fail to carry out their duties in a manner satisfactory either to the President or the Congress, something can be done to rectify the problem through the appointment of new chief judges when their allotted terms expire. This provides a desirable public accountability for the manner in which they carry out their duties.

3. Removal and Discipline (§588). The present process for disciplining ALJs was established by the Administrative Procedure Act. Agencies may not fire ALJs out of hand. The independence of the ALJ is protected by a system under which the employing agency may complain to the Merit Systems Protection Board (MSPB). After a hearing before an ALJ of the MSPB, an initial decision and exceptions thereto, the ALJ may be disciplined by the Board should that result be justified on the record. Judicial review may follow.

The lack of an adequate evaluation and disciplining system for ALJs was credited as a cause for legislation sponsored by the administration in 1979 and 1980 which would reduce the appointments of ALJs to limited terms. Fortunately, those proposals got nowhere with Congress. But concerns about evaluation and discipline of ALJs remain. S.594 specifies "misconduct or neglect of duty" as grounds for disciplining and provides for removal for physical and mental disability. (§588(a)(1)) A Complaints Resolution Board of ALJs is to be established. Procedures are provided for complaints, investigations, the filing of charges by the Council, and proceedings before the Merit Systems Protection Board. (§588 (c)(g))

One problem not clearly resolved is how the Corps will handle the case of the ALJ who simply is not carrying his or her share of the load. Congress will be tight-fisted with the Corps. Forced by appropriations bills to make do with fewer ALJs than it

would wish for, the Corps will have to find ways of getting the job done without denials of due process or unreasonable delays. It will not be able to avoid coming to grips with what is "unacceptable performance" by an ALJ.

Thank you for the opportunity to appear before you.

LAW OFFICES
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June 22, 1989

VIA HAND

Honorable Howell Heflin
Chairman
Subcommittee on Courts and
Administrative Practice
United States Senate
Washington, DC 20510-6275

Re: S.594, The Administrative Law Judge Corps Act

Dear Senator Heflin:

Enclosed are my responses to the follow-up questions of Senator Thurmond and yourself which were sent to me under letter dated June 14, 1989.

If I can be of further help to you and your colleagues in considering this important legislation, please let me know.

Sincerely,

John Miller

John T. Miller, Jr.

Enclosure

HEARINGS ON S.594
101ST CONGRESS, 1ST SESSION

RESPONSES OF JOHN T. MILLER, JR.
TO FOLLOW-UP WRITTEN QUESTIONS BY
SENATOR STROM THURMOND

Question 1

Mr. Miller, this question is for you. The main concern of those who oppose this bill centers upon the potential loss of expertise among current ALJ's who serve particular agencies. How will the seven divisions of ALJ's created by S.594 maintain the expertise necessary to handle the depth of analysis required of most ALJ's who service a particular agency?

Answer 1

The expertise of an ALJ may be evaluated from two points of view. First, how does the ALJ perform as a judge? Second, how well does the ALJ understand the facts, laws, regulations and policies at issue in the cases to be decided. I assume the question relates to the latter type of expertise.

S.594 provides for the organization of the judges into seven divisions. The judges are to be assigned to a division based on their actual experience. Thus, from inception of the ALJ Corps, the current judges can be expected to continue hearing cases involving the agencies which now employ them, unless the agency's hearing requirements prove to be insufficient. In that event the surplus ALJs will be put to fruitful use as judges at another agency or department where they are needed.

S.594 clearly imposes on the ALJ Corps the obligation to provide the continuing legal education needed to ensure that the ALJs assigned to the hearings of a particular agency will acquire and maintain the degree of expertise required to perform their duties most efficiently. This is a distinct improvement over the present situation.

One-third of the present ALJs are eligible for retirement. Another one-third will be eligible for retirement in the next five years. These circumstances provide both the opportunity, and the need, for creating a new organizational structure, one that assures in the future that ALJs are appointed in timely fashion and are employed when and as needed. If nothing is done to prepare for that day, agencies faced with the immediate loss of many of their judges will place an almost irresistible pressure on OPM to allow them to appoint agency staff lawyers as ALJs on the ground that their "expertise" is required to dispose more quickly of the agency's case load. The invidious practice of "selective certification" which favored agency lawyers in the appointment process and, in my opinion, seriously sapped public confidence in the independence of the ALJs, or some device like it, will capture the appointment process. This is not in the public interest. I cannot see the sense of waiting for that day to try to remedy the situation.

The maturity of the ALJs now in service offers the opportunity for a peaceful transition to a well-trained, vigorous group of successor ALJs imbued with the spirit that during their

professional life-times they will serve as judges wherever Congress, the departments and agencies conclude that they are needed to ensure that the federal administrative process operates fairly and efficiently.

Question 2

Mr. Miller, regarding the issue of protecting the impartiality of ALJ's in relation to the agencies they service, have there been instances in the past where agencies have sought to improperly influence the decisions of ALJ's?

Answer 2

As my response to this question I can do no better than adopt the following statement from the August, 1988 report of the Section of Administrative Law to the House of Delegates of the American Bar Association relative to proposals to establish an independent corps of ALJs:

> Fairness concerns stem from an apparent dissatisfaction with the original compromise adopted by the APA -- many lawyers and litigants view it as unfair, or at least unseemly, for ALJs to be employed by an agency that is a party in the case. Although there have been very few cases of actual infringement of decisional independence in 40 years, the "appearance-of-fairness" argument has grown stronger as more and more ALJs have been assigned to hear and decide cases involving benefit claims (e.g., social security, black lung) or civil penalty cases (e.g., Program Fraud Civil Remedies Act of 1986), where factual issues predominate and fairness concerns are highest. Indeed, the largest employer of ALJs, the Social Security Administration (with two-thirds of all the judges), has been accused of imposing pressure on its ALJs to increase production and decrease allowance rates. See, e.g., Association of Administrative Law Judges, Inc. v. Heckler, 594 F. Supp. 1132, 1143 (D.D.C. 1984) (court finds "untenable atmosphere of

tension and unfairness which violated the spirit of the APA").

The seriousness and persistence of these problems and negative perceptions is cause for concern. The American Bar Association should support the enhancement of judicial independence and efficiency of federal administrative law judges. Steps need to be considered and taken.

Question 3

Mr. Miller, in your prepared statement you state that the present system does not provide Administrative Law Judges with the assurance of a life-time judicial career. In your opinion, do Administrative Law Judges anticipate a life-time judicial career when they accept the position? How many ALJ's make a career out of the position?

Answer 3

Yes, I believe that most lawyers anticipate a life-time judicial career when they accept appointment as an ALJ. Lawyers in private law practice burn their bridges when they are appointed as judges. It is very difficult to revive a private law practice.

As for lawyers in government service, the appointment as ALJ usually represents a promotion to close to the top of the hierarchy of federal officialdom. For candidates from both private and public service sources, the appointment as ALJ brings with it an obvious prestige and the offer of a challenging life-time experience. The fact that so many ALJs continue to serve when they are eligible for retirement shows the attractiveness of such a career.

Question 4

In your prepared statement, Mr. Miller, you explain that creating a corps of Administrative Law Judges will enable judges to direct their talents to agencies with the greatest number of pending cases. As a result, you claims ALJ's will no longer be involved in make-work projects designed to fill "idle time". This concerns me; are there currently ALJ's who do not have a sufficient caseload?

Answer 4

The loan program operated by the Office of Personnel Management offers an opportunity for employment as judges to ALJs who are otherwise not fully employed. Whether all of the eligibles are occupied in the program, I cannot say. I doubt it.

In my prepared remarks I noted several agencies which, in the past, experienced dramatic reductions in the numbers of ALJs employed. Given the time lag involved in bureaucratic reorganizations, the constantly fluctuating case loads of particular agencies, and the natural desire to avoid the discharge of competent judges (in hopes that the work load might increase), I believe it safe to say that at any given time there are judges not fully employed under the present system.

The organization of the ALJ Corps should permit the system to work more efficiently and effectively. Judge can be assigned where they are really needed without jeopardy to their careers. The possibly of a planned change of assignment for an ALJ no longer needed by a particular agency should make the judge's life

more interesting and more challenging. This should enhance performance.

HEARINGS ON S.594
101ST CONGRESS, 1ST SESSION

RESPONSES OF JOHN T. MILLER, JR.
TO FOLLOW-UP WRITTEN QUESTIONS BY
SENATOR HOWELL HEFLIN

Question 1

You have a wealth of experience and knowledge concerning the role of Administrative Law Judges in our system of justice. In your opinion are reforms needed in this system? Why?

Answer 1

The recruitment and appointment system administered by the Office of Personnel Management (OPM), and its predecessor the Civil Service Commission (CSC), has proved able to meet the demands for newly appointed judges. Beginning in 1962 there have been significant reforms in this part of the system. It appears to be functioning efficiently and effectively. I do not recommend any change in this part of the system.

In my opinion, a reform is needed in the utilization of Administrative Law Judge (ALJs). Experience shows that the needs of departments and agencies for ALJs can change dramatically over a relatively short period of time. The Interstate Commerce Commission is a case in point. The agency lost most of its judges, while the Social Security Administration's needs for judges grew very large. Changes in legislation and agency practices which effect such results cannot be forecasted very far in the future.

The present system is defective in that it lacks means which assure that ALJs whose services are not needed by a department or agency, either on a short term or a long term basis, will continue to be employed in activities consistent with their chosen careers as administrative law judges. This is not conducive to the efficient and effective employment of the ALJs. Nor is it good for their morale.

Question 2

A criticism which has been continually voiced is that an independent ALJ Corps will not be responsive to various agency needs. Further, critics of the bill seem to believe that we would be creating a system in which judges will not be responsive to agency policies. This bill envisions critical and ongoing dialogues between the various governmental agencies and the corps. How would you respond to this criticism?

Answer 2

The question involves two different problems. Let me address each. First, will the ALJ Corps be responsive to the agency's needs? The ALJ Corps ought to be able to meet the agency's needs better than the present system permits. It is fair to assume that the agency will let the Corps know of its hearing needs sufficiently in advance of each fiscal year so that the Council can assign sufficient judges to the Corps division having responsibility for the agency's hearings, and provide on a timely basis continuing legal education for those judges who may need it. Should the agency's hearing needs prove more heavy than

anticipated, the Corps has the ability to assign judges from other divisions on a short term basis to meet those requirements. Conversely, if an agency has overestimated its needs for ALJs, the Corps can use the judges, who might otherwise not be fully employed, to hear cases before other agencies.

Second, will the ALJs be responsive to agency policies? I assume that this question addresses policies which, by law, the ALJ is required to follow and not mere policy statements which are not binding on the ALJ in a contested case. See Pacific Gas & Electric Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974). I see no reason why the ALJs will be any less responsive to agency policies than they are at the present time. They will be aware of those policies. It is to be expected that either the agency counsel in the case, or one of the parties, will identify the policies which must be applied in resolving the issues in the case. Those policies, and prior orders and decisions interpreting and applying those policies, are published in a form readily available to the ALJ. If they are not, the agency ought to rectify the deficiency in any event. It has been my experience that the ALJs know of their responsibilities in this area, and any deficiencies can be addressed through appropriate CLE seminars.

Question 3

Your testimony indicates that ALJs are not being effectively utilized in government agencies, and that sometimes agencies "make work" for ALJs who may not have enough work. Given this

fact, doesn't this legislation actually aid efficiency and the efficient distribution of a valuable resource, namely an ALJ's time and expertise?

Answer 3

Yes. Given the ebb and flow of demands for hearings before ALJs, it is not to be expected, under the present system, that the number of ALJs employed by an agency will always match the need for their services. At times the ALJs may be under-employed. At other times the agency might have to borrow ALJs from other agencies to meet temporary peak demands, or put up with delays in the hearing process. One positive virtue of the ALJ Corps is its ability to tailor the number of ALJs assigned to hold hearings to the needs of the particular agency.

Question 4

It is my understanding that currently, not all agencies have uniform procedures whereby litigants are aware of their substantive and procedural rights under the law. From your perspective as a practitioner, is the problem pervasive and would S.594 be an improvement over the current system?

Answer 4

I have not personally made a recent study of the lack of uniformity of procedural rules among agencies. I know that the problem exists. Uniformity of procedural rules is not a handicap for lawyers who spend all or a majority of their time in practice before one agency. But lack of uniformity can handicap lawyers for a time, even those with considerable administrative law

experience, when they appear before an agency where they have not practiced before. Uniformity of procedural rules should give interested parties more of a choice of counsel to present their views in hearings before ALJs.

Section 585(d)(4) of S.594 offers an improvement over the present situation. After a two year transition period, the Council of the Corps may prescribe uniform rules of practice and procedure. Concerned agencies will be afforded an opportunity to comment on any proposal and to give their reasons why modifications may be warranted in order to permit the new procedures to meet their particular needs more efficiently.

Question 5

Currently the Bill divides the Corps into seven working divisions with each judge being assigned to work within that specific division. How would you respond to critics of the bill that this will result in a reduction of the expertise of judges who are assigned to determine a particular matter?

Answer 5

The bill contemplates that the ALJs currently employed by 30 departments and agencies will be grouped into seven divisions. (Section 584(b)(1)-(7)) This will permit many of the judges to handle work before several agencies where their expertise may be readily applied. The following list of division assignments offers one possibility:

(1) Division of Communications, Public Utility and Transportation Regulation

Federal Communications Commission, Federal Energy Regulatory Commission, Interstate Commerce Commission, Department of Transportation, Federal Maritime Commission, Nuclear Regulatory Commission

(2) Division of Safety and Environmental Regulation

Occupational Safety and Health Review Commission, Federal Mine Safety and Health Review Commission, National Transportation Safety Board, Environmental Protection Agency, Department of the Interior, Department of Commerce

(3) Department of Labor

Department of Labor

(4) Division of Labor Relations

National Labor Relations Board, Federal Labor Relations Authority

(5) Division of Health and Benefits Programs

Social Security Administration, Health and Human Services

(6) Division of Securities, Commodities and Trade Regulation

Department of Agriculture, Federal Trade Commission, Commodity Futures Trading Commission, Securities and Exchange Commission, International Trade Commission

(7) Division of General Programs and Grants

Drug Enforcement Administration, Department of Housing and Urban Development, Food and Drug Administration, Small Business Administration, U.S. Postal Service Department, Merit Systems Protection Board, Coast Guard, and the cases of all other Executive Departments and agencies not specifically assigned to any of the other divisions.

I do not believe that such assignments will reduce the expertise of the judges. The provision for continuing education in section 585(d)(11) ought to enable each judge to maintain the necessary level of expertise.

Question 6

There has been a continual concern over the evaluation and disciplining of Administrative Law Judges. As you recognized in your testimony, this has led to previous proposals that ALJs be appointed to limited terms. What is your opinion of the discipline system envisioned by this Bill?

Answer 6

Congress should make it clear that the performance of each ALJ should be evaluated by the ALJ Corps each year, utilizing the American Bar Association's Guidelines for Evaluation of Judicial Performance or other high set of standards taking their place.

The proposed provisions for the discipline and removal of ALJs appears to be well thought out. The independence and the reputation of the ALJ is safeguarded while the merits of any complaints are being examined. I do not doubt that a few years of experience with the proposed procedures will be worth a ton of speculation as to how the proposal might be improved upon. The Council itself can develop public confidence in the procedure by keeping complainants reasonably informed as to what has been done in response to their complaints, and by letting the ALJs see that care is taken to protect them from unjustifiable abuse.

Senator HEFLIN. Judge, I understand this is the first time the American Bar Association has taken a position on this legislation. Can you provide some of the background that led the American Bar Association to endorse this bill for the first time?

Judge VITTONE. Well, as I said, Mr. Chairman, the various elements within the American Bar Association have had under consideration the proposal to create a corps of administrative law judges. It is a topic which has been discussed at various sections in the American Bar Association.

Last year, the joint recommendation of the four sections that I mentioned was put on the calendar of the house of delegates and was scheduled to be voted on at the annual meeting in Toronto. There was also a second resolution which was adopted by the administrative law section of the ABA.

Both resolutions were essentially the same, except that the resolution of the administrative law section that if it was necessary to protect the independence of administrative law judges, then Congress should consider the enactment of a corps, whereas the resolution which was adopted by an overwhelming vote of the house of delegates took a more positive attitude and said that a corps should be established. That proposal was also adopted by the board of governors prior to the time the house of delegates' action.

Senator HEFLIN. Thank you. Written questions will probably be submitted to both of you and, if you will, we would appreciate your prompt reply.

Now, while the next panel is coming around, the opening statements of all participants will be made a part of the record, and the record will stay open.

We have Chief Judge Parlen McKenna, Federal Administrative Law Judge Conference, here in Washington; Judge Irving Coleman, Jr., Association of Administrative Law Judges, Mobile; and Chief Judge Alan Heifetz, Forum of Administrative Law Judges, in Washington.

Judge McKenna, if you will start.

PANEL CONSISTING OF PARLEN L. McKENNA, FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE, WASHINGTON, DC; IRWIN W. COLEMAN, JR., ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC., MOBILE, AL; AND ALAN W. HEIFETZ, THE FORUM OF UNITED STATES ADMINISTRATIVE LAW JUDGES, WASHINGTON, DC

STATEMENT OF PARLEN L. McKENNA

Judge MCKENNA. Thank you, Senator. Chairman Heflin, members of the subcommittee, thank you for the invitation to testify in favor of the passage of S. 594, a bill to establish an independent corps of administrative law judges.

I appear today representing the views of the Federal Administrative Law Judges Conference. I am currently the chief judge at the Department of the Interior. My career started with the law firm in New Mexico of Keleher and McLeod. Subsequently, I became corporate counsel for Hughes, chief counsel for the Civil Aeronautics Board, vice president and general counsel of Pacific Express Holding, and senior counsel at AT&T. I was appointed an administra-

tive law judge at the Department of Labor in 1985 and assumed my current position in January 1988.

My professional affiliations include the executive committees of the Federal Administrative Law Judges Conference and the judicial administration division of the ABA. Regarding the judicial administration division, I am currently chairman of the committee on the administrative judiciary and the community and vice chairman of the legislative committee. I have also served in the past as vice chairman of the ethics and professional responsibility committee.

Importantly, Senators, as you recognize, my views do not reflect the official views of my Department.

The enactment of S. 594 will redress critical problems adversely affected Americans who seek Social Security benefits, face the loss of licenses to engage in federally regulated businesses, suffer the consequences of civil penalties which could run into the millions for breach of a Federal regulation, or otherwise, depending upon the fairness and impartiality of hearings conducted by Federal administrative law judges.

Importantly, 13 States have already taken the lead and transferred their administrative law judges to an independent central panel to eliminate their dependency upon agencies whose programs and missions are directly affected by the judges' decisions.

The Federal Government still assigns its more than 1,000 administrative law judges to approximately 29 departments and agencies where they are maintained and supported in-house as subordinate employees.

We believe that the transfer of these judges to an independent corps where each will be assigned to a specialized division in accordance with his or her expertise, as the bill provides, combines the best features of the present system—specialization and merit selection—with the following four improvements.

Public perception of fairness of hearings: Many times, I have held hearings and had individuals go up to the Government attorney and say, who do you work for. You would say, well, I work for the Department of Labor. And then he looks over at me and he says, well, judge, who do you work for. And I say, well, I work for the Department of Labor. The same place that that guy works? Yes, sir. I mean, you can say what you want, but the facts are clear.

The more efficient use of administrative law judges: This is very important to me. This is the primary reason that I think that this legislation should be enacted once you cure the perception problem.

There are numerous cities throughout the United States which maintain administrative law judges—San Francisco, Boston, New Orleans, New York, Los Angeles, Denver; multiple agencies, multiple support facilities—photocopying machines, space, hearing rooms, judges. We do not at this time have the facility to cross-utilize the judges in any acceptable fashion.

Not more than a month ago, I called one of the other chief judges regarding getting the ability to borrow some judges. He was very cooperative. I went back to my agency and I said I got a good deal. We didn't have the money—fact of life. I didn't get the judges and our backlog is still there.

The cost savings, I believe, will be in excess of $20 million a year. I think that is something—in these times of fiscal constraint, we need to save as much money as possible.

As the subcommittee is aware, FALJ has given testimony regarding the enactment of the corps bill previously, and rather than belabor the point, I have attached to my remarks the previous testimony of Chief Judge Victor Palmer before the Subcommittee on Administrative Law and Government Relations, Committee on the Judiciary, House of Representatives.

Finally, FALJ would like to commend Senator Heflin and the other Committee members for their fine work regarding this proposed legislation. We recognize that some of our members have historically expressed reservations about some of the provisions of the bill. However, an overwhelming majority of the judges in the system support the bill. Moreover, recent discussions within our community, we think, have led to a better understanding, and we expect as we work these problems out a new consensus to develop.

Thank you very much.

Senator HEFLIN. Thank you.

[The prepared statement of Judge McKenna and answers to questions submitted by Senators Grassley and Thurmond follow:]

STATEMENT OF

CHIEF JUDGE PARLEN L. MCKENNA

FOR

THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

THE ADMINISTRATIVE LAW JUDGE CORPS ACT

(S. 594)

JUNE 13, 1989

I. Introductory Remarks for Oral Presentation

Chairman Heflin and Members of the Subcommittee

Thank you for the invitation to testify in favor of the passage of S. 594 — a bill to establish an independent corps of Administrative Law Judges. I appear today representing the views of the Federal Administrative Law Judges Conference (FALJC).

Currently, I am the Chief Judge at the Department of the Interior. My career started at the New Mexico law firm of Keleher and McLeod. Subsequently, I have become corporate counsel for Hughes, Chief Counsel for the Civil Aeronautics Board, Vice President and General Counsel of Pacific Express Holding and Senior Counsel at AT&T. I was appointed an Administrative Law Judge at the Department of Labor in 1985 and assumed my current position in 1988.

My professional affiliations include the executive committees of the Federal Administrative Law Judges Conference and the Judicial Administration Division of the American Bar Association (ABA). Regarding the Judicial Administration Division of the ABA, I am currently chairman of the Committee on the Administrative Judiciary and the Community and Vice Chairman of the legislative committee. I have also served in the past as Vice Chairman of the Ethics and Professional Responsibility Committee.

Importantly, as you recognize, my views do not reflect the official view of the Department of the Interior.

The enactment of S. 594 will redress critical problems adversely affecting Americans who seek social security benefits, face the loss of licenses to engage in federally regulated business, suffer the consequences of civil penalties which could run into the millions for breach of a federal regulation, or are otherwise dependent upon the fairness and impartiality of hearings conducted by federal Administrative Law Judges.

Thirteen states have already taken the lead and transferred their Administrative Law Judges to independent central panels to eliminate their dependency upon agencies whose programs and missions are directly affected by the Judge's decisions. The federal government still assigns its more than 1,000 Administrative Law Judges to 29 departments and agencies where they are maintained and supported in-house as subordinate employees. We believe that transfer of these judges to an independent corps where each will be assigned to a specialized division in accordance with his or her expertise, as the bill provides, combines the best features of the present system — specialization and merit selection — with the following four improvements:

1. Public Perception of Fairness of Hearings

Many have the perception that Administrative Law Judges assigned

to departments and agencies, particularly those who were previously staff members, have an institutional bias in favor of the agency. Their separation from the departments and agencies who often appear before them as parties is crucial to both actual fairness and impartiality, and the public's perception that justice is indeed being done.

2. More Efficient Use of Administrative Law Judges

The present system divides the management of judges and cases among 29 separate departments and agencies and there is no effective way to assign Administrative Law Judges in accordance with the varying peaks and valleys in their case loads. As a result, this highly trained expert resource within the federal government is not being utilized to the best advantage to achieve prompt disposition of administrative proceedings.

3. Significant Cost Savings

It is envisioned that improved case load management would reduce personnel requirements. Further more, substantial savings would be derived by eliminating the replication of hearing facilities and support staffs at the 29 departments and agencies. Additional savings would be achieved through the use of modern office equipment and computers throughout the corps.

4. Availability of Administrative Law Judges to Assist Over-loaded Federal Courts

The bill expressly authorized federal courts to refer to specialized proceedings to Administrative Law Judges serving as special masters. An existing cadre of Administrative Law Judges would thus become available to assist the federal judiciary and provide an inexpensive remedy to the pressing problems now facing the federal courts.

As the subcommittee is aware, FALJC has given testimony regarding the enactment of a corps previously. Rather than belabor the point, I have attached to my remarks the previous testimony of Chief Judge Victor W. Palmer before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, United States House of Representatives (H.R. 451 and H.R. 1213, dated March 17, 1988).

Finally, FALJC would like to commend Senator Heflin and the other committee members for their fine work regarding this proposed legislation. We recognize that some of our members have historically expressed reservations about some of the provisions of the bill. However, an overwhelming majority of the Judges in the system support the bill. Moreover recent discussions within our community have lead to a better understanding of the bill and we expect a new consensus to develop.

DRAFT

STATEMENT OF

JUDGE VICTOR W. PALMER

FOR

THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW

AND GOVERNMENTAL RELATIONS

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

THE ADMINISTRATIVE LAW JUDGE CORPS ACT

(H.R. 451 AND H.R. 1213)

--------[DATE]--------

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I. Introductory Remarks For Oral Presentation

Chairman Glickman and Members of the Subcommittee:

I appreciate your invitation to state the views of administrative law judges who favor the establishment of a corps of administrative law judges. The essential questions are:

What good will it do? Why is it needed?

A centrally managed corps of administrative law judges would guarantee the fairness of hearings that administrative law judges conduct. It would solve problems caused by unequal work loads and varying forms of administrative law judge management and support --- agency-to-agency. It would eliminate the suspicions of bias that necessarily arise out of the subordinate status of ALJs as agency employees. It is also the most moderate solution to pressing problems now afflicting the ALJ system which is materially different from the way it was when the APA was enacted some 40 years ago.

Whereas, in 1947, only 13 ALJs were employed by the Social Security Administration, and over 60% of all ALJs then employed by the Federal government were assigned to cases of the economic regulatory agencies; today, approximately 70%, or nearly 700 ALJs, are employed by SSA and less than 7% now preside over ratemaking, licensing, and formal rulemaking cases - the hearing models typically contemplated in case books and treatises on administrative law. 1/

The large number of ALJs in SSA's employ led it to establish monthly production quotas and to actively seek the discipline and removal of ALJs believed to be low performers. These efforts have subjected SSA to attack from every quarter and charges that it has pressured ALJs into deciding factual questions on the basis of political considerations. Various congressional committees have concluded that questionable employment practices by one Administration have been reversed through equally questionable practices by its successor. 2/ The core issue is whether ALJs at SSA decide cases on the basis of what they believe to be the credible evidence in the cases coming before them - or are they yielding to agency pressures to meet politically oriented goals?

Only Congress can assure the future fairness of administrative adjudications by its enactment of the laws needed to end such agency practices. Practices, I should add, which have come to the attention of the courts and have been listed by at least one District Judge as the reason why decisions by ALJs at SSA must now be treated as unreliable. 3/

But instances of agency abuse of the independence of administrative law judges are not restricted to SSA. Specific examples are discussed at length in the attached law review articles and in the testimony given this May before the Senate Judiciary Committee. 4/

The proper and efficient management of ALJs is likewise not restricted to SSA. Twenty-nine agencies presently employ ALJs. Deregulation has caused some of them to have more judges than needed for their remaining work (ICC and OSHRC are prime examples). Others, with more popular missions, have been unable to readily obtain the full number of ALJs they need, and those attempting to meet basically short-term workload increases have become subject to costly, long-term employment commitments. Under the present system, a large body of ALJs would have to be hired and added to the total number of ALJs if the Immigration Bill now before the House should become law, even though the present ALJ cadre is ample to handle such cases. Then too, of the 29 agencies where ALJs are employed full-time, 6 have only 1 judge and 19 have 6 ALJs or less. Obviously, there is great waste in this system which centralization would cure. The General Accounting Office has charged in two separarte reports to Congress that the lack of effective and uniform management of ALJs is a major problem plaguing the administrative process. 5/ Many agencies, GAO has charged, practice a policy of benign neglect to, one would imagine, insulate themselves from the kind of public outcry and congressional inquiries which have attended the various management initiatives SSA has attempted to implement.

Placing the day-to-day supervision of ALJs in a central employment unit outside of the agencies whose cases ALJs hear would eliminate these impediments to effective management. It

would also eliminate the appearance of ALJ bias and the actual, institutional bias that necessarily exists at those agencies where every ALJ is known to be a former staff attorney.

Moreover, 11 States have now established central panel systems to solve similar problems. 6/ Each State has reported the new system to be a complete success, and many others are considering its implementation. The Governor of New Jersey, for example, appointed a Blue Ribbon Commission to investigate and evaluate that State's Central Panel System and it reported: 7/

> "The Committee's investigation led to a conclusion that the Office of Administrative Law was an efficient, well-run organization which represented a significant improvement over the former hearing system in terms of quality and productivity."

Those who nonetheless oppose an ALJ Corps principally complain that it would lead to a diminishment of ALJ expertise, and ALJ accountability to the agencies whose cases they hear. Those objections are without merit.

The bills before this Subcommittee would require the ALJ Corps to consist of distinct, specialized divisions in keeping with the various specialized fields of administrative law. Each ALJ's depth of understanding of these specialties should increase with complete exposure to the full panoply of interpretive nuances placed on guiding principles by the whole body of agencies where they have application.

Knowledge gained through the previous experiences of an ALJ transferred to a division would be available to be shared as a common resource by all. Self pride, peer pressure, and the freshness of problems presented, should motivate each ALJ to update and broaden his knowledge of his chosen specialty.

Some who oppose the Corps concept have suggested that after the Corps' establishment, ALJs will be assigned to difficult cases outside their areas of specialized knowledge and that the divisions will be dismantled. Such arguments make no sense. Last year, the Research Director of the Administrative Conference of the United States attended the first meeting of Chief ALJs from states with central panel systems and reported that even those without a mandate to preserve specialized expertise have come to recognize its value and have tailored their assignment practices to assure that difficult cases are heard by established experts. 8/ It is to be expected that those who would head the corps would do the same.

Moreover, Mr. Chairman, your bill, H.R. 1213, contains specific provisions to assure that ALJ expertise will be maintained and employed.

> Its Section 565 provides for the establishment of, "....after consulting with each agency, initial and continuing educational programs to assure that each administrative law judge assigned to hear cases of an agency has the necessary training in the

specialized field of law of that agency;" and for . . . "the training of other employees of the Corps, so that the level of expertise in the divisions of the Corps will be maintained and enhanced."

Its Section 568(b) further provides that: "...Administrative law judges shall be assigned to cases within their division in rotation, to the extent practicable, except that any case involving a difficult or significant question of law, fact, or policy shall be assigned to a judge possessing expertise in the subject matter involved."

Concerns that ALJs may be less accountable to agencies under the Corps or that agency policies will be ignored or thwarted, are mistaken.

With a Corps in place, each agency shall continue to have review authority over individual ALJ decisions. This power has not been diminished in any State which has a central panel system; and it is not proposed or contemplated by proponents of the federal ALJ Corps.

It should be kept in mind that the only current role ALJs have in respect to the implementation of agency policy is to apply established agency policy. This obligation would continue under the Corps. To the extent an agency does not have an established policy, ALJs have been called upon at some agencies to suggest new policy. But their suggestions do not come out of

thin air. They devolve from existing rules and regulations and published policy statements, or in the event those are lacking, testimony presented by the agnecy's personnel as elaborated by arguments of counsel.

The APA presently restricts, and will continue to restrict, the communication of agency policy by ex parte means. An ALJ decision must be based upon substantial evidence of record and ALJs are totally dependent upon evidence for the exercise of their decisional functions. Furthermore, in light of the fact that an agency continues to have, under each bill before Congress, ultimate decisionmaking authority under its right of review of ALJ decisions, policy that an ALJ may suggest can never become implemented without an agency's concurrence.

To the extent that a Corps increases ALJ independence from agency influence, it does so only in respect to the ALJ's role as an independent fact-finder. That is the basic premise upon which the APA was bottomed when enacted in 1946. This form of independence was believed then to be absolutely necessary if agency decisions were ever to be considered reliable and trustworthy. Enhancing the independence of that aspect of an ALJ's employment keeps faith with the APA and is essential to the continuing worth of the office.

This concludes my oral remarks but, I ask, Mr. Chairman, that the remainder of this statement and the two accompanying law review articles be included and made part of the record.

II. The Essential Reasons for Establishing a Corps

We believe that the total separation of administrative law judges from the 29 Executive Departments and agencies, where they are presently employed, is the essential first step to meaningful, regulatory reform.

Until this is done, Americans will never be convinced that they are being given fair hearings by impartial judges. Many of the employing Departments and agencies regularly appear before the judges as party litigants. The agency employing the largest number of administrative law judges is perceived to be pursuing policies designed to thwart the very claims for statutory entitlements that come before the judges for resolution. Neither circumstance engenders public trust and confidence.

The past president of the American Bar Association, Bernard G. Segal, stated the problem in a nutshell: 9/

> Consider, for example, the unavoidable appearance of bias when an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party. One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder."

The establishment of a unified corps of administrative law judges would do more than any other single act to strengthen public confidence in our federal administrative system which must be both fair and appear to be fair. It is also the key to more efficient and less costly adjudication.

Statistical data from those states which now employ administrative law judges as members of central panels, show the savings that do result when the judges are brought together in a single corps.

At present, federal administrative law judges are employed by 29 separate Departments and agencies, each replicating the others in the maintenance of Clerk's offices for the docketing of cases, filing systems, case tracking systems, and systems for preparing statistical reports. They each employ separate staffs of clerks, stenographers, para-legals and other support personnel. Some have modern office equipment that is under-used, others have none. Modern computerized systems for docket management, including the tracking of cases and the preparation of the reports to which Congress and the public are entitled, are already in place both at the Department of Labor and the National Labor Relations Board, and either system would be sufficient to take care of the entire needs of the corps that this legislation would establish. But the greatest savings would come about from increased efficiencies and flexibility in the assignment of judges to cases.

In the absence of an ALJ Corps, there is no practical method for assigning judges at agencies where caseloads are dwindling to the work of those agencies with backlogs. 10/ Programs to loan judges, agency-to-agency, have encountered several practical problems. Should the lending agency continue to carry the judge on its payroll? How much should the borrowing agency pay as "rent" for the judge? If work suddenly picks up at the lending agency, can it retrieve the then needed judge? Moreover, when an agency admits that its own need to hold hearings has diminished to the point that the ALJs in its employ are available for a loan program, the agency exposes its judges, its attorneys and the rest of its hearing process personnel to reduction-in-force actions and budgetary reductions.

The unified corps will be able to adjust the assignment of judges to cases with better correlation to the variuos peaks and valleys of individual agency caseloads. This would eliminate agency overstaffing to meet surges in adjudicative activities in order to avoid backlogs and constituent complaints.

Furthermore, the bills specifically authorize federal courts as well as agencies to refer certain types of proceedings requiring hearings to the Corps of Administrative Law Judges. This will identify ALJs as a ready resource to meet pressing problems. Over 1,000 highly trained and experienced administrative law judges will thus become identified as available to assist the Courts and every government agency desiring a decision by neutral experts based on a hearing record.

As existing caseloads are more evenly distributed among administrative law judges, they will be able to absorb such added duties without incurring added costs.

Both bills, then, would accomplish the following significant objectives:

(1) The actual fairness of administrative adjudications would be guaranteed;

(2) The appearance of ALJ bias would be eliminated;

(3) Significant cost savings would result;

(4) Administrative law judges would be employed more efficiently;

(5) Administrative law judges would be made instantly available to every agency, and would be identified as available to assist, when requested, our overloaded federal courts.

The administrative law judge community, as represented by their major professional associations, supports these objectives.

Administrative law judges support these bills because they will accomplish each objective without disrupting any of the time-proven attributes and safeguards already part of the administrative system. A minority of administrative law judges do not favor the enactment of either bill and would instead preserve the status quo. But it should be noted that when the merits of these bills have been debated in our community, the debates have never centered on whether enactment would improve ALJ status or compensation or whether some ALJs might be caused to work harder. ALJ support and opposition to the bills is based

on individual perceptions of the due process requirements that are applicable to the hearings we conduct.

Neither bill changes the current decisional relationships between the judges and agencies. Agency review of decisions by administrative law judges would continue. Each agency would remain the final arbiter of its own policy subject only to judicial review as presently provided under the Administrative Procedure Act (the APA).

Most importantly, the system now in place for the merit selection of administrative law judges is left intact. The system is unique and should not be weakened in any way. It provides that applicants for administrative law judge positions must submit to rigorous written and oral examinations conducted by the Office of Personnel Managment to demonstrate their legal expertise. They are further required to produce proof of at least seven years experience as judges or trial lawyers handling complex cases.

Individual judges would continue to be selected on this basis. They would be assigned, however, not to individual Departments and agencies, but to specialized divisions within the Corps, in keeping with their particular fields of legal expertise.

At this point, an essential underlying question requires address. Why now, nearly 40 years after the enactment of the

Administrative Procedure Act, should administrative law judges be separated from agencies?

III. Changes in the Types of Hearings Conducted

In 1947, over 60% of administrative hearings involved rate-making, licensing and other forms of rulemaking by the various economic regulatory agencies. In 1982, those agencies accounted for less than 7% of the hearings conducted by administrative law judges. Rulemaking hearings conducted for the consideration of regulatory agencies in their formulation of policy for proscriptive application on an industry-wide basis, occupies a shrinking percentage of the federal administrative judiciary. 11/ Today, an administrative law judge is more likely to hear an enforcement action or a claim for social security benefits. In either case, his or her functions are essentially judicial and are inconsistent with continued status as an agency subordinate.

A. Civil Penalties and Other Administrative Sanction Cases

Accusatory actions by agencies seeking civil money penalties to enforce statutory provisions and administrative regulations were rarely the subject of administrative hearings in 1947. Even as recently as 1965, it could still be said that administrative authority to assess penalties was "rarely conferred" and that "it (was) a close question whether there (was) sufficient advantage in conferring" such power. 12/ But by 1971, 7 executive departments and 13 independent agencies had collected well in excess of $10 million in penalties during the fiscal year, in

over 15,000 cases. The Administrative Conference of the United States (ACUS) reported this as "an important and salutary trend." 13/ It urged the advantages of the "administrative imposition system" stating:

> "The already critical overburdening of the courts argues against flooding them with controversies of this type, which generally have small precedential significance." 14/

ACUS went on to recommend that federal agencies "should evaluate the benefits which may be derived from the use (or increased use) of civil money penalties as a sanction." 15/ This 1972 ACUS recommendation encouraged agencies to impose civil money penalties through APA adjudications on the record, not subject to de novo reviews by United States District Courts, but reviewed instead by United States Courts of Appeals under the APA's substantial evidence rule. 16/

In 1976, the Supreme Court held such enforcement procedures to be constitutional. 17/

By 1979, ACUS was able to report:

> "The civil money penalty has become one of the most widely used techniques in the enforcement programs of federal administrative agencies."
>
> * * * *
>
> "Since adoption of that Recommendation in 1972, the use of civil money penalties in general and of administratively imposed civil penalties in particular has increased significantly, and the constitutionality and desirability of administratively imposed penalties has been widely recognized." 18/

To the growing list of accusatory proceedings conducted by administrative law judges must be added those that enforce statutes by the imposition of sanctions having even harsher consequences: revocation or suspension of a license to engage in a business or profession subject to federal control, withdrawal of inspection services required to sell various products (such as meat) interstate, and the entry of findings which preclude future industry employment. The continued status of administrative law judges as employees of those Departments and agencies which now actively appear before them as prosecutors cannot be justified on any basis. 19/

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . .
>
> This Court has said . . . that 'Every procedure which would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14. In re Murchison, 349 U.S. 133, 136 (1955).

B. Claims for Social Security Benefits

In 1947, only 13 administrative law judges heard cases involving the Social Security laws. Today, nearly 700 are so assigned. In 1947, 63.8% of the federal administrative judiciary conducted hearings for economic regulatory agencies, and only

6.6% for the Social Security Administration. That pattern has completely reversed with 67.3% of the judges now hearing Department of Health and Human Services (HHS) cases, and only 6.7% conducting hearings for the economic regulatory agenices. 20/.

This is because the requests for hearings by administrative law judges skyrocketed. They increased from 121,500 in fiscal year 1974 to 320,000 in fiscal year 1982. 21/

This phenomenal increase in requests for hearings was the direct result of greater initial denial of applications by state agencies, and aggressive actions taken to terminate previously granted benefits. Using fiscal years 1976 and 1980 as references, the denial rates at the state agency level rose from 41.6% to 60.4% for initial denials, and the reconsideration denial rate increased from 72.3% to 82.2%. In 1982, benefits were cut off from 195,000 beneficiaries after the highest number of reviews of continuing eligibility in the program's history, 471,337.

The increased rates of denial similarly overburdened the federal courts at both the district and appellate levels. At the beginning of 1982, there were 19,000 cases pending and new cases were being filed at the rate of 9,000 every year. Since the federal courts have been able to render decisions in no more than 4,600 social security cases per year, an overwhelming backlog of social security cases now plagues the federal courts.

The explosion in the number of HHS cases thrust upon the courts and the administrative judiciary was the direct result of changes in agency policy, implemented through more restrictive standards for granting disability benefits claims. These restrictive standards differ from those applied by the administrative bench and the federal courts. They were ruled to be "arbitrary, capricious, irrational and an abuse of discretion" by U. S. District Court Judge Earl Larson who ordered 20,000 mentally ill people in the Midwest to be restored to the disability rolls. Mental Health Association of Minnesota v. Schweiker, 554 F.Supp. 157 (D. Minn., December 1982).

The Social Security Administration disregarded admonishments that its refashioned standards were contrary to governing organic law and imposed a policy of "non acquiescence" upon its judges, directing them to disregard court decisions with which it disagreed. 22/

Moreover, as the judges' employer, the Social Security Administration instituted agency review of the decisions by those judges who had granted more than the "average" number of appeals by claimants. 23/ The judges came to believe they were being pressured by SSA to deny claims, 24/ and filed a lawsuit 25/ to stop such practices. The District Court Judge who heard their case agreed that the actions of the agency showed "an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions. . . . 26/ The District Court Judge further found that

SSA's "insensitivity to that degree of decisional independence the APA affords to administrative law judges . . . could have tended to corrupt the ability of the administrative law judges to exercise that independence in the vital cases that they decide." 27/

However, on the basis of assurances that these practices had been permanently ended, the lawsuit was dismissed. But Professor of Political Science, Donna Price Cofer, found when she made current her comprehensive survey of the SSA hearing process, that similar practices have begun again: 28/

> "(B)ureaucratic pressures upon the ALJs continue to be reality. . . . The use of terminology such as 'goals', 'performance expectations,' and 'performance feedback' (in current memoranda) seems very much like the terms 'targeting', 'goals', and 'behaviour modification', which the federal district court judge pointed to . . . as phrases used by the Agency in the past that could corrupt the ability of ALJs to make independent decisions."

Professor Cofer warns: 29/

> "(T)here are consequences to be anticipated in placing production quotas in the hands of politically-sensitive administrators. Such measures have critically impaired the credibility of the disability determination process in the past, a process which is designed to protect an insurance trust fund to which working Americans involuntarily contribute."

Like Professor Cofer, our concern is with principles of fundamental justice. These ongoing agency practices undercut the right of every disability claimant to a determination by an impartial judge. They subvert the Supreme Court holding that administrative law judges have judicial functions by making them

mindful of the consequences of their decisions to the agency and its budget when their exclusive concern should be the merits of each individual case. Butz v. Economou, 438 U.S. 478 (1978); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980); Benton v. United States, 203 Ct. Cl. 263, 488 F.2d 1017 (1973).

Claimants are made to suffer the abridgement of fundamental protections guaranteed them by the due process clause of the Constitution. That is the ultimate cost of such agency policies and practices.

> Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

IV. OPM as Protector of the ALJ Program

The Administrative Procedure Act contemplated that the Civil Service Commission, now the Office of Personnel Management, would protect the independence of administrative law judges. The Supreme Court reiterated this responsibility in Ramspeck v. Trial Examiners Conf., 345 U.S. 128, 139 and 142 (1953).

The selection process as currently administered by OPM has become a praiseworthy model for making judicial appointments that should be retained. But, OPM has otherwise failed to distinguish itself in fulfilling its responsibility to the ALJ program.

Lawyers seek to become administrative law judges because they regard the positions to be judicial and intellectually challenging. OPM has the responsibility for attracting and retaining the most qualified lawyers as applicants for administrative law judge positions. However, OPM, by its actions, does little to attract the most qualified candidates, and it customarily demonstrates an institutional resistance to the treatment of these positions as judicial in nature.

In 1983, OPM undertook a governmentwide classification study to link administrative law judge positions to those held by government attorneys who perform "hear and decide type work." 30/ Such a linkage would seriously impair the public perception of administrative law judges as impartial triers of fact who are independent and institutionally dissimilar to the agency attorneys who appear before them. Particularly disturbing to the judges and the legal community were comments by OPM officials that "egregious grade creep" 31/ had affected ALJ salaries. The support for this assertion was a comparison of applicable grades in 1946 and 1983 which ignored the fact that bar membership was not required of candidates until 1964.

OPM has also so far ignored the recommendations of a fact-finding study group sponsored by its predecessor. This study group began work in 1973 and became known as the "La Macchia Committee" for its chairman, the Civil Service Commission's Deputy General Counsel, Philip La Macchia. It reviewed current literature, case law and government statistics.

Personal interviews were conducted with every chief administrative law judge, representatives of every federal agency where administrative law judges were employed, and numerous government and private attorneys who customarily practiced before the judges. In addition, questionnaires were sent to the 800 administrative law judges then employed by federal agencies, to all of the agencies where they were employed, to 700 government attorneys, and to 150 attorneys in private practice. Specific responsibility for developing facts and conclusions on various aspects of administrative law judge employments was divided among nine subcommittees. Two special subcommittees were assigned to study the ability of administrative law judges to preside over cases for more than one agency without compromising their expertise. Both subcommittees dismissed the compromise of expertise as a problem, and suggested that the establishment of a unified corps had greater merit and was more feasible than a voluntary loan program. 32/ The Committee wholeheartedly endorsed the Corps concept. 33/

As envisioned by the Committee, the Corps would preserve expertise and meet stated agency objections by being organized into specialized divisions. The Committee's recommendation for a Corps was overwhelmingly supported by administrative law judges. The Committee's collected statistics showed that sixty-nine percent of the administrative law judges who completed the written questionnaire favored a self-administered corps and only eight and one half percent were opposed to its creation. 34/

Another finding by the La Macchia Committee concerned agency practices in reviewing administrative law judge decisions. It found that the resolution of cases were often being substantially prolonged without the substance of the ALJ's decision being materially altered. The Committee recommended the adoption of rules to make administrative law judge decisions final, subject only to discretionary agency review.

In testimony before the Senate Judiciary Committee on the need for an Administrative Law Judge Corps, Professor Victor G. Rosenblum assessed the strength of the Office of Personnel Management's commitment to the improvement of the administrative law judge program subsequent to the La Macchia study. 35/ Professor Rosenblum testified that the various suggestions of the Committee have "lapsed into limbo" and that OPM has demonstrated "truncated enthusiasm" for its Office of Administrative Law Judges. 36/ He cited a GAO study which resulted in the release of two reports. 37/ The reports made it very clear that both the Civil Service Commission, now OPM, and the agencies, failed to heed the recommendation of the La Macchia Committee to curtail inordinate review of the judges' decisions: 38/

> "Although the Administrative Procedure Act was enacted to resolve conflicts promptly and fairly, timely decisions are not being made because the process is burdened with extensive reviews. . . .
>
> . . . . .

> "While agencies have the authority to review Administrative Law Judges' decisions, the process is burdened unnecessarily with multiple layers and numerous agency personnel. This increases the time required to reach a final decision by hundreds of days and the cost by millions of dollars.
>
> . . . . .
>
> "These multilayer review processes also raise doubts that the Act's goals -- making Administrative Law Judges an important factor in the decision process and assuring that agency views are not being unduly emphasized or secretly submitted -- are being achieved."

The GAO investigators were also troubled by inadequate management of ALJ functions; the failure of CSC to maintain and use information showing administrative law judge productivity to evaluate agency requests for additional judges; and its pro forma approval of agency requests to use selective certification for choosing new judges. 39/ In the closing chapter of its first report, the GAO restated its concerns and concluded: 40/

> "These criticisms are not new. For the past 30 years, committees, studies, and advisory groups have said substantially the same things. Yet, little has been done by the Congress, employing agencies, or CSC to significantly improve the situation."

A year after circulation of its first report, GAO issued a second report, summarizing its prior recommendations and evaluating the responses. 41/ This report concluded that the recommendations by GAO had been largely ignored and that all who had received copies of the first report were doing "little to improve the administrative law process." 42/

V. The Corps is Needed to Instill Public Confidence

The establishment of a unified corps of administrative law judges is essential to instill confidence in the fairness of the administrative process.

We have given two principal examples of cases heard by administrative law judges which require them to be separate and apart from their present employing agencies. But every member of the administrative judiciary requires this protective insulation. Proper and efficient administration of the functions and employment of all judges holding their appointments pursuant to Article I of the Constitution, requires that they all be part of a single body having rationally defined divisions where the expertise possessed by each judge may be put to the fullest use.

It perhaps bears brief emphasis here that, as a nation, we have come to increasingly rely upon the substance and procedures of administrative law. As stated by Justice Jackson:

> "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart."

The 1969 report of the Ash Council is a useful starting point for congressional staff members to begin their review of the widely acknowledged problems of the present-day administrative process; it summarized the first two decades under the Administrative Procedure Act of 1946 and contains a detailed

bibliography of the early, pertinent literature. 43/ Recent articles by members of the academic community emphasize the need to guarantee fair administrative hearings through the separation of administrative law judges from Executive Departments and agencies. 44/

Various states have taken this step and have already established the equivalent of the proposed Corps. 45/

The federal administrative process will be vastly strengthened by a centrally managed corps of administrative law judges. The "Corps approach" is a natural progression in the continuing evolution of the art and science of administrative law. More importantly, this change will go far to correct longstanding deficiencies in the administrative process. It will prevent the exercise of supervisory dominion over administrative law judges by agencies which are tempted to manipulate the adjudicative process to attain what are perceived to be politically desirable goals. Each agency now chooses who will be its Chief Judge and may choose a pliant person who will readily accede to agency desires rather than act as a bulwark against injustice. Then, too, agencies have very real control over the assignment of their cases, and true mechanical rotation is neither required nor observed. Opportunities for routing an important case to an ALJ whose known predilections favor the agency position definitely do exist. The agency's control over the office space; secretarial and clerical services allocated to each judge; the promptness with which reimbursements are made to

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a judge for his or her expenses of travelling to a hearing; these are but a few examples of the many ways an agency controls a judge's work and working conditions. Each has given rise to allegations of improper carrot/stick pressuring of administrative law judges. 46/

The basic need for an independent Corps stems from the fundamentally independent, judicial nature of the administrative law judge function. The same independence of function was recognized in another context years ago, when the administration of the federal court system was removed from the Department of Justice.

It cannot be overemphasized that the proper function of the administrative law judge is not, and should not be, that of a policymaker or a team player. The function should not be obfuscated by labeling it as "quasi-judicial." The essence of this function in modern day administrative adjudication is that of a judge; nothing more and nothing less. Impartial factfinding which requires the application of laws, court interpretations, and articulated congressional and agency policy is a judicial function. The independence essential to the function should be guaranteed by the physical and administrative separation needed to ensure and demonstrate the integrity of the administrative process.

Agencies may assert that the administrative judiciary should not be independent because the administrative process as a whole

is an agency matter. This position, however, ignores the fact that administrative law judges are -- plainly and simply -- judging controversies to which the agency in most instances is a party. Thus, if due process is to be achieved, the rulings and decisions by administrative law judges while, of course, subject to agency and court review on-the-record, must be independent of outside-the-record influence or control by the agency.

Indeed, unless overwhelming economic savings were to be demonstrated favoring the status quo, which is not the case, it would appear that no argument exists for the present system of agency housing of administrative law judges. The principal result of maintaining such a system is the perpetuation of agency potential to influence the judges by outside-the-record considerations. Since, however, the economic balance of costs would plainly favor central housing and administration of the administrative judiciary, a fair -- and vital -- question must be raised as to why the existing system is not changed to ensure the independence of the function of the administrative law judge.

The organization of administrative law judges as a single Corps whose services are available to all administrative agencies for the conduct of hearings under the APA is a logical step in the evolution of the administrative law process and one which has many attendant benefits in terms of cost savings, efficient employment of judges, and the strengthening of integrity and the effectiveness of government programs.

The funding of all administrative law judge functions through one organization would create major savings of resources while giving the Congress, the provider of these resources, a far greater assurance that the administrative law judges are fully and properly employed and that the program results of their actions will be in a form susceptible to effective Congressional oversight, review by the courts and evaluation by the public.

At present, each agency has its own judges even though the judges are qualified to provide judicial services for other agencies. 47/ Under elaborate procedures for the selection and qualification of administrative law judges, the Office of Personnel Management develops an official list, or register, of judicial applicants eligible for selection by the agencies. Since the requirements for placement on the register are principally the same for all agencies, 48/ it is clear that the administrative law judges are all basically qualified to serve any agency. The benefits of their expertise and familiarity with the work of certain agencies can be effectively preserved by assigning them to appropriate divisions within the Corps. We believe that the structure proposed by H.R. 451 and H.R. 1213, discussed in detail, infra., will both preserve expertise while protecting necessary judicial independence.

VI. The States Provide Precedents

A unified corps of federal administrative law judges finds precedent in state governments. 49/

In Maine, an Administrative Court has been established having jurisdiction over licensing cases. The licensing agency appears as a party before the Maine Administrative Court and its decisions are subject to review only by a higher court.

Eleven other States have established central panel systems, namely: California, Colorado, Florida, Massachusetts, Minnesota, Missouri, New Jersey, Tennessee, Washington, North Carolina, and Wisconsin. Under the central panel system, administrative law judges are assigned to a single, central panel that provides trial services to various agencies as needed. Substantial cost savings and efficiencies have been achieved in each of these States and compelling statistical evidence has been compiled and published by the States of Minnesota and New Jersey. More importantly, each State has witnessed improved public perception of administrative law judges as members of a truly independent administrative judiciary.

The central panel system is incorporated as part of the Model State Administrative Procedure Act, as revised in 1981, and a growing number of States are now actively considering its adoption. During the past two years, the following 16 States have either made a proposal to their legislatures to establish a central panel system, or are in the process of studying the concept: Alaska, Arizona, Georgia, Illinois, Indiana, Maryland, Michigan, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Virginia and Wyoming.

VII. Analysis of the Two Bills

A. The Structure of the Corps and the Appointment Process

Both bills provide for the management of the Corps by a Council consisting of the Chief Judge and Chiefs of specialized divisions. They would be the only political appointees. Moreover, under H.R. 1213, which we believe is preferable in this respect, only the initial division chiefs would be by Presidential appointment; subsequent vacancies would be filled by the Council itself.

All administrative law judges presently employed by individual agencies would automatically become members of the Corps upon enactment of either bill. Future administrative law judges would continue to be tested and screened by OPM and the Council would be required to fill vacancies from among the best five candidates certified as qualified by OPM. Both bills expand the list of eligibles available for selection from the best three to the best five candidates certified by OPM to increase opportunities for women and minority candidates who are less likely to be entitled to veteran's preference.

The Chief Judge would be appointed for a five-year term by the President by and with the advice and consent of the Senate. The integrity of the merit system is maintained by requiring the candidate to be an administrative law judge for at least five years preceeding appointment. H.R. 1213 further provides, and we believe wisely, after serving as chief judge, an individual could

serve as an administrative law judge unless removed from office for cause.

Both bills provide that the Presidential appointments of the Chief Judge, and, as applicable, the Division Chiefs would be from lists provided by a Judicial Nomination Commission. H.R. 451 provides for a five member commission with each of the following selecting one member: The Chief Judge of the United States Court of Appeals for the District of Columbia Circuit; the Chief Judge of the United States District Court for the District of Columbia; the Chairman of the Administrative Conference of the United States; the Chairman of the Administrative Law Section of the American Bar Association; and the President of the Federal Administrative Law Judges Conference. H.R. 1213 omits the latter two and provides for a three member commission. On balance, H.R. 1213, by eliminating the influence of private associations, gives the public greater assurance that the appointment process will be beyond the influence of special interests, and therefore we support this change as an improvement.

The Corps would be divided into divisions in keeping with the major specialties of Administrative Law. Each division would be headed by a Division Chief Judge who must possess experience and expertise in the division's field of adjudication, have served as an administrative law judge for at least five years, and be nominated for appointment by the Judicial Nomination Commission. Both bills authorize the Council of the Corps to establish as many as 10 and not less than 4 divisions.

ANSWERS BY PARLEN MCKENNA
TO QUESTIONS SUBMITTED BY:

A. SENATOR GRASSLEY

1. Uniform Rules of Practice.

Uniform Rules of Practice for the conduct of Administrative Hearings have long been considered desirable by practitioners and legal scholars. They are now considered to be even more desirable as judges are transferred to different agencies and lawyers no longer restrict themselves to the cases of one agency. Many agencies have responded by incorporating or adopting the federal rules of evidence.

It is not our intention, however, that there will no longer be special rules covering special concerns implicit in the proceedings of an individual agency. Moreover, full agency participation in the drafting of procedural rules should be encouraged and is recommended.

2. Public Perception of ALJ Impartiality

The vast bulk of the hearings now conducted by ALJs personally affect individual Americans who are unfamiliar with administrative law. Some of these Americans have openly questioned whether these hearings are fair and impartial since both the judge and the attorney representing the other side are employed by the same agency or department. Illustrative of this perception that the hearing may not be fair are the comments of a meat packer found to have distributed adulterated meat. See the attached August 25, 1984 issue of the Denver Post.

On the other hand, are current ALJ hearings actually fair and impartial? Yes, they are. Passage of S.594 will assure that Americans will understand them to so be.

3. Support for ALJ Corps Legislation by the FALJ Membership.

When FALJ last polled its membership, some 70 percent of the responding members supported legislation to create an Administrative Law Judge Corps.

This past year, representatives of those ALJs who questioned the wisdom of such legislation have indicated their concerns can be met by revising the bill now being considered. Judge Alan Heifetz has given testimony on the progress of such efforts which we expect shall continue.

B. SENATOR THURMOND

1. Cost Savings.

To resolve this question, the Congressional Budget Office has been asked for its analysis. In its preliminary report, CBO estimates cost savings of upwards of **20 million dollars**. The suggestion by those who question the wisdom of the proposed legislation on the basis that a "new bureaucracy" will be created, miss an essential point. The work of administrative law judges is already at hand. The issue of whether greater economies will be achieved by the judges being detailed through an umbrella organization rather than as employees of individual agencies, is resolvable, therefore, on the basis of economies of size and centralized management of resources.

The CBO report explains the way various costs are likely to be saved.

2. The APA As A Barrier to Undue Influence.

In previous testimony before this committee Professor Victor Rosenblum Northwestern University Law School, who once opposed the ALJ Corps concept as unnecessary under the APA, explained why he had changed his mind. His testimony (S.Hrg 98-555 on S.1275, September 20, 1983, at pages 193-198 and 256-266) explained that the APA contemplated that the fairness of the ALJ program would be safeguarded by the Civil Service Commission. (CSC since replaced by OPM). But he concluded, at 264 of his reported testimony:

> "CSC and OPM have had multiple opportunities over almost four decades for development of a systematic, fair, integrative, and efficacious ALJ program. There have been several worthy starts in that direction followed by witherings, abandonments and abortions of the efforts. A fresh start through the Corps concept is warranted, promising and practicable... I'm happy to support it."

This testimony is most compelling, coming as it did from an eminent professor of administrative law, who also served as a past chairman of the ABA's administrative law section, as a past vice president of the American Judicature Society and as a member of the Administrative Conference of the United States.

Saturday, Aug. 25, 1984 Section C ★

BUSINESS

THE DENVER POST

Stanko plants may forfeit inspections

Denver Post Staff, Wire Reports

Nebraska Beef Processors, which formerly operated the defunct Cattle King Packing Co. in Adams County, could lose its federal inspections under an order issued in Washington, D.C.

An administrative law judge ruled that federal meat inspection should be withdrawn from Cattle King Packing Co.; Stanko Packing Co. Inc., Gering, Neb.; and Nebraska Meat Packers, Gordon, Neb., the USDA said. All these companies did business under the "Nebraska Beef Processors" trade name, but the Gordon plant is the only one still in operation.

If the U.S. Department of Agriculture withdraws its inspection services, however, it effectively would shut down the plant. Meat that isn't federally inspected cannot be shipped across state lines.

The Cattle King plant, just north of Denver, was closed in February following allegations of serious slaughtering and beef handling deficiencies. In April, Monfort of Colorado Inc., owner of the packing facility site, donated it to the Western Stock Show Association, which said the plant would become the Monfort Research Center.

The Gering plant is under option to the PackerLand Packing Co. of Green Bay, Wis., and is not operating. The prospective new owners will have to apply for federal inspection before they reopen, officials said.

Donald L. Houston, administrator of USDA's Food Safety and Inspection Service, said the plants have until Sept. 24 to file an appeal with the USDA judicial officer.

Former Cattle King manager Henry Stanko Jr. was sentenced Aug. 6 to one year in jail and fined $1,000 after pleading guilty to selling adulterated meat.

Rudolph "Butch" Stanko, a cousin and owner of Cattle King, is scheduled to go on trial Sept. 4 in U.S. District Court in Denver on similar charges.

John A. Campbell, the administrative law judge, issued his decision Monday. Inspection was dropped at Cattle King for two years, the Gering plant for 23 months and at the Gordon plant for two years.

Campbell upheld USDA's charges that Cattle King illegally processed adulterated meat, processed cattle that had died before they could be slaughtered and concealed those actions from USDA personnel.

'We're going to appeal that decision.'

Henry 'Butch' Stanko

"We're going to appeal that decision. The judge reluctantly withdrew inspection from Nebraska Beef of Gering. I quote him," Butch Stanko told The Denver Post Friday evening from his home in Gering.

"I think it was because he does work for the Department of Agriculture. He felt a lot of pressure. He was on the Department of Agriculture team. You always vote with your team, don't you?" Stanko said.

"It wasn't a bipartisan judge. He is an administrative judge for the Department of Agriculture."

Stanko blamed the inspection order's inclusion of the Gordon slaughter plant on the fact that Stanko owns a one half-interest in that plant with his father, Rudy Stanko Sr. "That's the only reason he gave," Butch Stanko said of Campbell's decision.

Stanko denied that he has any control over the Gordon operation. He said his interest in this plant is in a blind trust.

As in the past, Stanko defended the Nebraska company's management of the old Cattle King plant. "The Cattle King plant in Denver, which a year ago was employing 400 people and slaughtering around 2,000 head of cows a week for the ranchers of the state of Colorado, has never reopened. They can't even give the plant away."

Senator HEFLIN. Judge Coleman, we are delighted to have you. Go ahead with your testimony.

STATEMENT OF IRWIN W. COLEMAN, JR.

Judge COLEMAN. Mr. Chairman, I am Irwin Coleman, Jr., and I have been an administrative law judge with the Social Security Administration for a period of 14 years. I previously to that worked with the Department of Justice as an assistant U.S. attorney in Mobile. In addition to that, I practiced before that for about 10 years in private practice with a major law firm. My interest is primarily with the Social Security ALJ portion of this project.

We had thought in 1947 that the Administrative Procedures Act would be the solution to the problems that existed. Regretfully, the Administrative Procedures Act as presently written is not enough protection. Administrative law judges are not sufficiently protected from agency pressures. They are not judicially independent.

An addition to the Administrative Procedures Act system is critically needed. This bill is the overall answer. This bill provides a structure that will prevent the abuses existing today. That is my view, and that is the view of the Association of Administrative Law Judges in Social Security. I am a board member of that organization.

What are the abuses that compromise judicial independence today? I regret to say that they are more of the same, and new ones as well. While this committee is headed in the direction of protecting due process, the Department of Health and Human Services and the Social Security Administration are headed in the opposite direction.

As one judge wrote in March of this year when he retired:

> My principal reason for retiring is that the Social Security Administration has always opposed the APA hearing process which is mandated by law. SSA has since at least 1975 carried on a systematic campaign of harassment, insult, and intimidation against the administrative law judges.

Who are these people who wish to send every judge into the courtroom with a specter over his shoulder? If I grant this case, will my reversal rate go high? If I ask for more evidence, will my processing time be bad? Dare I do anything that will anger them? I have kids in school; I have obligations. Could I survive economically if they misuse the removal process, as they have done before to others, to attempt to fire me? Who are these people? What are they trying to do?

Why is it an unpardonable sin to simply give the judges a staff to supervise, and rely on the consciences of the good men and women who have been selected to do this important and vital work?

Born of a desire to strip the judges of control of their dockets and staff, the most destructive initiative to us and to the public has been reconfiguration. The administrative law judges watch in despair, handcuffed, isolated, watching the reputation of a once proud agency evaporate, and the work product done for them declines.

Social Security lost its reputation in the Federal courts in the middle 1980's. Today, its own people are ashamed, and now they turn to Medicare adjudication and attempt to circumvent the Ad-

ministrative Procedures Act. A secret agenda exists and a public disaster will occur.

Passing by the part B and the part A cases and turning to the sanction cases, the most despair for due process lies there. HHS has taken the position that not all administrative law judges are competent to preside over these cases, and a special select group of administrative law judges has been exclusively certified—40 out of 700. HHS does no service to the truth or its own credibility with absurd decisions like this.

Even so, after stacking the deck, is HHS happy? Well, if you wonder, listen to the complaints of the inspector general of HHS who investigated the sanction cases originally and was reported in "Medical Utilization Review," headlined "HHS Inspector General Belittles SSA Administrative Law Judges," to have said, "They are poorly equipped to handle highly contentious sanction cases. Beyond that, ALJ's often aren't informed on pertinent medical issues, and many are incompetent due to having had frontal lobotomies because of accidents in their youth," Kusserow joked to a luncheon audience.

Of course, it is a truism judges cannot protect themselves in public brawls because, by law, they cannot discuss pending cases. So what is to happen? Was the IG admonished? Certainly not.

On May 31, 1989, by internal memorandum, HHS transferred jurisdiction of the sanction cases to the regional chief administrative law judges in the Office of Hearings and Appeals, an even more select group of only 10, all of whom have just been promoted.

It would not come as a surprise if I said agencies do not like to have their decisions reversed, nor would it break new ground to say that agencies will take steps to prevent reversals. For them to hire good lawyers and argue hard and well that a reversal is incorrect is the good, old American way. Working behind closed doors to handpick the judges and blind-side the Administrative Procedures Act is something else again.

Thank you.

Senator HEFLIN. Thank you. We appreciate your testimony.

[The prepared statement of Judge Coleman and answers to questions submitted by Senators Heflin and Thurmond follow:]

STATEMENT OF IRWIN W. COLEMAN, JR.
ADMINISTRATIVE LAW JUDGE AND MEMBER OF
BOARD OF DIRECTORS OF THE
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.
DEPARTMENT OF HEALTH AND HUMAN SERVICES
BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE,
THE SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE.

Mr. Chairman and Members of the Committee, good afternoon.

I am Irwin W. Coleman, Jr., an Administrative Law Judge in Mobile, Alabama, with the Department of Health and Human Services, Social Security Administration and a member of the Board of Directors of the Association of Administrative Law Judges. I very much appreciate the opportunity of appearing here in support of the Unified Administrative Law Judge Corps Bill. I am here at the invitation of the Committee and the views I express are my own and those of the Association and most certainly are not the views of the Department of Health and Human Services, or the Social Security Administration or the Office of Hearings and Appeals. Nationally, the Office of Hearings and Appeals in the Social Security Administration consists of 702 Administrative Law Judges (at this moment) assigned to 133 field offices, of all of about 1100 Administrative Law Judges in the federal government.

I have attached my resume to my written statement. Briefly, I have been an Administrative Law Judge in Mobile for the past fourteen years. Before that I was an Assistant United States Attorney in the Southern District of Alabama, and before that I was in private practice as an associate and then a partner with a major law firm in Mobile involved in complex trial and appellate litigation in a number of legal fields.

There continues an enormous power struggle ongoing in government between the Executive Agencies and the Administrative Procedure Act. Historically, agencies of the Executive Branch were perceived as having unlimited power to act and in the adjudication of individual cases were accused of being unfair, stacking the record, and using internal agency personnel who were beholding to agency management. The 1947 Administrative Procedure Act was thought to be the solution, creating officers now called Administrative Law Judges who were to be judicially independent of Agency pressures, thus being able to have full and fair hearings, to create full, fair, and complete records, and to make impartial decisions based on the Constitution, the Statutes, the Agency Regulations, the case law and Agency policy properly and publically expressed.

Regretfully, the Administrative Procedure Act as presently written is not enough protection. Administrative Law Judges are not sufficiently protected from agency pressures -- they are not judicially independent.

An addition to the Administrative Procedure Act system is critically needed. This Bill is the overall answer! This Bill provides a structure that will prevent the abuses existing today. That is my view. That is the view of the Association of Administrative Law Judges.

The Bill takes all of the Administrative Law Judges in the federal government out of the Agencies. It houses the Judges

together and puts the Judges in charge of administering judicial business. The people trained by education and experience to appreciate and understand due process will insure due process to the public.

What are the abuses that compromise judicial independence today? I regret to say they are more of the same and new ones as well. While this Committee is headed in the direction of protecting due process, the Department of Health and Human Services and the Social Security Administration are headed in the opposite direction.

As one Judge wrote when pressed for a reason for his retirement in March of this year:

> "My principal reason for retiring is that the Social Security Administration has always opposed the A.P.A. hearing process which is mandated by law. SSA has since at least 1974 carried on a systematic campaign of harrassment, insult, and intimidation against the Administrative Law Judges. This campaign is well documented by court and congressional records. As a result of this effort by SSA the morale of my office is so depressed that to continue my employment would be detrimental to my physical and mental health."

Who are these people who wish to send every Judge into the courtroom with a specter over his shoulder -- If I grant this case will my reversal rate be too high? If I ask for more evidence will

it ruin my statistical processing time? Dare I do anything that will anger or displease THEM? I have kids in school. I have obligations. Could I survive economically if THEY misuse the removal process as THEY have done before to others to attempt to fire me? Who are these people? What are they trying to do?

Why is it an unpardonable sin to simply give the Judges a staff to supervise and rely on the conscience of the good men and women who have been selected to do this important and vital work? Who are these people who spend the day on the taxpayers' payroll to attack and demean the Judges?

Born of desire to strip the Judges of control of their dockets and staff, the most destructive initiative to the public has been reconfiguration. Ignoring the necessity of close, cooperative functioning over years of common working experiences between a Judge and his staff, the unit system has been jettisoned. Substituted is a pooled system directed entirely by non-judicial managers. Free of accountability for judicial quality work, the staffs' pride in their work and morale are ebbing away. The Administrative Law Judges watch in despair, handcuffed and isolated, as the reputation of a once proud agency evaporates and the work product done for them declines. Social Security lost its reputation in the federal courts in the middle 80s; today, its own people are ashamed.

And now THEY turn to Medicare adjudication and attempt to circumvent the Administrative Procedure Act. A secret agenda exists, a public disaster will result!

Three types of cases are pertinent: Part A, Part B, and Sanctions.

Presently, the House Judiciary Committee is examining the question why the Department of Health and Human Services - Health Care Financing Administration has stockpiled the Part B cases and none have been heard in-person by Administrative Law Judges, after a March, 1989, hearing failed to produce evidence that any had. Following close on the heels of last year's Dial-A-Judge Program which was thwarted by Congress, the future for Part B cases and claimants is not bright.

Part A cases have been "heard" by Administrative Law Judges. That is insufficient for Health Care Financing Administration -- Bellmon review lives again! Displeased because "too many" cases have been "reversed" - a study has been secretly undertaken to decide why Administrative Law Judges reverse the cases and how to fix the problem: "The findings will guide attempts to lower HHA and SNF reversal rates," reads a May 8, 1989, internal memorandum.

However, the Sanction cases pose the most despair for due process. Health and Human Services has taken the position not all Administrative Law Judges are competent to preside over these cases and a special, select group of Administrative Law Judges has been exclusively certified - 40 out of 700. Health and Human Services does no service to the truth, or its own credibility with absurd decisions like this. To use the Agency's own approach, the

Association wonders what the reversal rate is for the select few? Even so, after stacking the deck, is the Health Care Financing Administration happy?

Well, if you wonder, listen to the complaints of the Inspector General who investigated the sanction cases, reported in Medical Utilization Review, headlined:

HHS INSPECTOR GENERAL BELITTLES
SSA ADMINISTRATIVE LAW JUDGES

"HHS Inspector General (IG) Richard Kusserow is using unusually harsh language against Social Security Administration judges - a number of whom have rendered Medicare sanction decisions he doesn't like.

Physicians who feel they've been harmed unfairly by a Medicare sanction have the opportunity to go before an administrative law judge (ALJ) to seek redress. In 18 cases in which the IG sanctioned a physician following a PRO investigation, ALJs have ruled in favor of physicians 10 times.

Kusserow says ALJs typically handle disability cases that don't require opposing counsel. Thus, he argues, they're poorly equipped to handle highly contentious sanction cases. Beyond that, ALJs often aren't informed on pertinent medical issues and many are incompentent, due to having had "frontal lobotomies because of accidents in their youth," Kusserow joked to

a luncheon audience at the American Medical Peer Review Assn. on Apr. 24."

Of course, it is a truism Judges cannot protect themselves in public brawls because by law they cannot discuss pending cases. So, what is to happen? Was the IG admonished? Certainly not! On May 31, 1989, an internal memorandum transferred jurisdiction of sanction cases to the Regional Chief Administrative Law Judge in the Office of Hearings and Appeals, an even more select group of Judges, only 10, who have just been promoted.

It will not come as a complete surprise if I say Agencies do not like to have their decisions reversed. Nor should it break new ground to say the Agencies will take steps to prevent reversals. For them to hire good lawyers and argue hard and well that a reversal is incorrect is the good ole American way. Working behind closed doors to handpick the Judges and blindside the Administrative Procedure Act is something else.

Speak of "Unjustifiable preoccupations." What is the quota sought here? "Absolute predictability"?

Who are these people who tear at the fabric of traditional judicial values in our society?

My conclusionary remarks are those of Judge Charles Bono, the articulate and able President Emeritus of the Association of Administrative Law Judges.

"A fair appraisal of the history of the problem and how the agency has dealt with it since 1975 to the present leads to the inescapable conclusion that the solution does not lie within OHA or SSA reform. To begin with, the agency will never admit to a need for reform, and will argue that Judges are "mere employees", only semi-independent and not Judges but "quasi-judges" who should be accountable to the employer, as are other employees. The position of the agency is clear with respect to its attitude and philosophies towards the Administrative Law Judge position. The agency has, in many instances in the past years, made it clear that it is the agency that has a "mission" and that the Judges are just a group of employees who must strive to accomplish the agency's mission as announced from time to time, whatever they may be. Such a philosophy is a far cry from that contemplated by the APA and the decisional independence it was passed to insure.

The agency's only response to past criticism has been to institute management systems that usurp control of the Judges and place such control in the hands of managers. This has made matters worse. Increased "managerial costs" created by the multiplication of manager and supervisor positions with higher grades have been the only result of their actions.

Predictably, the agency will cite statistical records of an increase in the number of cases disposed of and increased "efficiency" of operation based upon such numerical achievements alone, as justification for their acts. Such arguments attest to the agency's philosophical inability to accept the parameters of a fair hearing system with due process, as the law requires. SSA has also clearly demonstrated, by its actions since 1975, that it is so philosophically opposed to the hearings and appeals system and the judicial indicia that attends it, that the agency is incapable of properly supporting or maintaining a system in fairness to the claimants and/or the Judges.

The solution, therefore, does not lie within SSA, but in the removal of the Judges from SSA and placing them in a separate unified independent corps such as contemplated by recently proposed legislation for all Administrative Law Judges in government service."

I must say: This Bill is a vision that not only conforms to our ideals, but comports with our national interest.

BIOGRAPHICAL DATA

IRWIN WELDON COLEMAN, JR.

Born: January 23, 1934, at Austin, Texas.

Parents:

Irwin Weldon Coleman, born October 19, 1906, at Vernon, Texas.

Mabel Gibbs Coleman, Born January 2, 1906, at Byers, Texas.

Education:

River Oaks Elementary School, Houston, Texas, 1939-1945.
Bailey Jr. High School, Jackson, Mississippi, 1945-1948.
Central High School, Jackson, Mississippi, 1948-1951, Graduated, 1951.
University of Texas, Austin, Texas, 1951-1956, Bachelor of Arts, 1955; Master of Arts, 1956.
University of Alabama, Tuscaloosa, Alabama, 1957-1959, Juris Doctor, 1959.

Professional Experience:

Law Clerk to Associate Justice Thomas S. Lawson, Supreme Court of Alabama, 1959-1960.
Associate, Law Firm of Lyons, Pipes & Cook, Mobile, Alabama, 1960-1966
Partner, Law Firm of Lyons, Pipes & Cook, Mobile, Alabama, 1966-1969.
General practice of Law, with specialization in Appellate Litigation in the United States Court of Appeals for the Fifth Circuit and in the Supreme Court of Alabama; Trial Court Tort Defense Litigation for liability, fire, fidelity, and health insurance companies; Trial Court Litigation of contract and policy provisions for liability, fire, fidelity, and health insurance companies; oil and gas and anti-trust litigation; plaintiff's tort litigation; and criminal defense.

Assistant United States Attorney, Southern District of Alabama, 1969-1975.
Solely responsible for all appellate litigation, criminal and civil, and all complex civil trial work in the Southern District of Alabama. Over the last six years of my term, I prepared and filed a printed brief in the United States Court of Appeals for the Fifth Circuit on the average of one printed brief every eleven (11) days and was successful in over 95% of all appeal cases.

In total, I have written and filed briefs in twenty-two (22) cases in the Supreme Court of Alabama and in excess of 125 cases in the United States Court of Appeals for the Fifth Circuit during my career.

I had a Top Security Clearance, was Security Officer for the U. S. Attorney's Office, and Payroll Disbursing Officer.

United States Administrative Law Judge, Office of Hearings and Appeals, Mobile, Alabama, June, 1975 to present.

Trial judge in over 7000 cases since appointment

Admitted to Practice before the following Courts:
The Supreme Court of the United States

The United States Court of Appeals for the Fifth and Eleventh Circuits
The United States District Court for the Southern District of Alabama
The Supreme Court of Alabama, and all other courts of the State of Alabama.

Professional Associations:

Member, American Bar Association
Member, Alabama State Bar Association
Member, Mobile County Bar Association
Member, Association of Administrative Law Judges in Dept. of Health and Human Services
Member, Federal Administrative Law Judges' Conference

Alabama State Bar Activites:

Member, Editorial Advisory Board of Alabama Lawyer, 1968-1970
Member, Practice & Procedure Committee, Appellate Procedure Sub-Committee, Alabama State Bar Association, 1966-1974
Member, Executive Committee, Young Lawyers Section, Alabama State Bar Association, 1964-1969.
Member, Remedial Legislation Committee, 1963-1964.
Chairman, Remedial Legislation Committee, 1964-1965.
Member, Small and Installment Loan Committee, 1964-1967.
Chairman, Small and Installment Loan Committee, 1968-1969.
Member, Economic Survey of Alabama State Bar Committee, 1966
Member, Constitution and By-Laws Revision Committee, 1967-1968.
Chairman, Registration of Automobile Titles Law Committee, 1967-1968.
Editor, Young Lawyers Section Bulletin, 1965-1966.
Delegate, Southern Regional Conference of Junior Bar Executives, 1967.
Speaker for Legal Seminar for Clergymen Project.

Law School Activities:

Vice President, Freshman Class, University of Alabama, 1957-1958.
Member, Board of Editors, Alabama Law Review, 1957-1959.
Casenote Editor, Spring, 1958
Comment Editor, Winter, 1958
Comment Editor, 1958-1959
Delegate, Southern Law Review Conference, 1958
Member, Bench and Bar Legal Honor Society (President, 1959)
Member, Phi Alpha Delta Legal Fraternity, Morgan Chapter, 1957-1959
Author, "The Invitee in Alabama," 10 Ala. L. Rev. 369-407 (Spring, 1958)
Author, "Constructive Knowledge of Negligent Condition of Invitor's Premises," 11 Ala. L. Rev. 125-138 (Fall, 1958)
Author, Casenote, 10 Ala. L. Rev. 476 (Spring, 1958)
Author, Book Review, 10 Ala. L. Rev. 483 (Spring, 1958)
Member, Law Day Moot Court Team, 1959.

Fraternal Organizations:

Kappa Alpha Order, Social Fraternity, University of Texas, 1951-1956
Charter Member, Mobile County K.A. Alumni Association, 1961-present (Secretary, 1961-1969)
Phi Alpha Delta Legal Fraternity, Morgan Chapter, University of Alabama, 1957-1959.

Family:

Married June 3, 1956, to Frances Elizabeth Thompson, born May 21, 1934, at Tokyo, Japan (born of parents who were U. S. citizens temporarily residing in Japan). Father: Dr. Wildridge Clark Thompson, born at Union Springs, Alabama, in 1904. Mother: Ruth Elizabeth McPherson, born at Hazelhurst, Mississippi, in 1904. Present address: 1346 St. Mary, Jackson, Mississippi

Children: Elizabeth Gibbs Coleman, born July 18, 1965.
Frances Lucille Coleman, born June 26, 1967.
Irwin Weldon Coleman, III, born November 4, 1973.

ANSWERS OF IRWIN W. COLEMAN, JR.
UNITED STATES ADMINISTRATIVE LAW JUDGE, MOBILE, ALABAMA,
TO QUESTIONS PROPOUNDED BY SENATOR HOWELL HEFLIN
CHAIRMAN OF THE SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
SENATE JUDICIARY COMMITTEE

Senator Heflin, in response to your questions of June 14, 1989, I offer the following:

1. The first time I witnessed a serious discussion of the concept that Judges should administer other Judges and Judicial business was in law school in the late 50s. Uncharacteristically, the professor dropped the "question and humiliate" methodology of legal training in favor of a lecture. The subject for the day was the due process clause of the Constitution. After covering the basic approach that the boundaries of the doctrine were unknown and, perhaps, infinite, to be elucidated and clarified on a case by case basis by the Supreme Court, he reviewed the then accepted wisdom on the subject, which in the trial or hearing context meant an impartial, independent decisionmaker, prior notice of the trial or hearing including the issues, a right to be heard and present witnesses, and a right of cross examination. The professor then stepped aside from existing law and shared his vision of the future developing doctrine. To paraphrase, he said lawyers and judges need to be free of lay interference at work. Attorneys should direct other attorneys and judges should handle judicial administrative business. Due process is a concept understood at least in spirit by those who have shared the common bond of legal training in law school. Just as the doctor is trained to practice medicine, the automobile mechanic to repair cars and trucks, attorneys and judges are trained to administer due process.

   A World class example of his farsightedness is the chaos credited by the Social Security Administration's initiatives to manage its Administrative Law Judges. Reconfiguration has taken control of staff and dockets from the ALJ. The history of its deprecations has been collected in a position paper entitled Statement of the Association of Administrative Law Judges, Inc. to the Disability Advisory Committee (May 1, 1989), detailing a number of basic reforms necessary to return judicial independence to ALJs in Social Security. A copy of that position paper is attached for the use of the Subcommittee. The Association believes S. 594 will provide the necessary reform and strongly supports the Bill.

2. Critics of S. 594 have raised this issue but it is a strawman. In reality, what the Agencies dislike is judicial review of their questionable policies according to established legal principles. They complain of the behavior of federal courts for the same reason all the time. In truth, the ALJs have no interest in setting Agency policy. They are interested in being able to independently decide each case appearing before them. No objection is lodged to including a specific provision in the Bill stating the ALJ Corps is to follow Agency policy, properly promulgated, in adjudicating individual cases, as suggested by Chairman Heflin in a question to the witness from the Department of Justice.

3. The debacle in regard to adjudication of Medicare cases is well known to both houses of Congress. It consists of blatant "judge-shopping" by an Agency that is a party in every case. A quick review is helpful. The Health Care Financing Administration contrived to create a special, new group of ALJs (as opposed to the over 700 ALJs already employed) of a lesser grade to be housed at Social Security headquarters in Baltimore, Maryland and who were to conduct "hearings" in Medicare cases by telephone. Quickly dubbed the "Dial-A-Judge" scheme the entire project was stopped in its tracks after Congressional hearings resulting in Congressional Action expressly prohibiting expenditure of government funds for that purpose. The aftermath has been not to assign the cases generally to the large body of existing, serving ALJs but to assign the cases to a specially chosen group of ALJs within the larger group. Critics are of the opinion HCFA is stockpiling the unheard Part B cases. You ask: Is there a plausible explanation for such a situation? Only if Judge-shopping by an Agency has suddenly become a desirable public goal. In my testimony, the Agency's motives were questioned, especially through public statements of its Inspector General. Now in a June 15, 1989, memorandum, there is created more "designated ALJs" and it further carves the cases into special categories.

   The present bill would halt this further circumvention of the Administrative Procedure Act. All ALJs are picked from a register created by OPM after a rigorous selection process. Commentators frequently rate the selection process as equal to or more detailed and demanding than that of district and court of appeals judges. Why does the Agency indulge in "judge-shopping?" Are its cases of such questionable value that they cannot stand a test before an impartial, independent decisionmaker chosen on a true rotation assignment basis? Is winning more important than justice?

Respectfully submitted,

July 7, 1989

IRWIN W. COLEMAN, JR.
United States Administrative Law Judge

Statement of the Association Of Administrative Law Judges, Inc. To The Disability Advisory Committee

Submitted by Judge Leonard E. Baloun, President
On Behalf of the Association of Administrative Law Judges, Inc.
Room 746 U.S. Courthouse
Spokane, Washington 99201

Major Contributors:
Judge Charles Bono, Past President Emeritus
Judge W.C. "Pat" Lynch, Vice President Elect

May 1, 1989

INTRODUCTION

On behalf of the Association of Administrative Law Judges, Inc. and the more than three hundred Administrative Law Judges employed in the Department of Health and Human Services, Office of Hearings and Appeals, and who are members of our organization, we thank you for the opportunity by this paper presentation to present our views. We appreciated, as well, your Committee's invitation through Jean H. Hinckley, Executive Director, to have a witness present at the public meeting your Committee held in Washington, D.C. on March 29 and 30, 1989. We regret that we were not able to send a representative to meet with your Committee for reasons set forth in our letter dated March 24, 1989 to Ms. Hinckley. It is our hope the information supplied to you in this document will be of use to your Committee. Should you desire additional information as to any of the aspects of the information reported, we will be glad to supply it in written form, or if you intend to have additional hearings, we will attempt to have a representative present if given sufficient advance notice.

While we had hoped to have received a transcript of the proceedings at the previous hearings before preparation of this paper, we have been advised that it will not be available for some time. Rather than delay providing useful information to your Committee until such time as the transcripts are readied, we are submitting our observations on the subjects addressed as identified in the public notice of the meetings. Since the purposes of the Committee's hearings and study are stated to concern only the "appeals process" in the Social Security Administration, we shall restrict our comments and observations to problems as we perceive them occurring at the hearings and appeals level in the Office of Hearings and Appeals and by Administrative Law Judges.

Preliminary to the consideration of the issue of needed reform, it should be recognized that of all of the systems operated within the Social Security Administration commonly referred to as the "appeals process," it is the level at which hearings are held before Administrative Law Judges which are identified by the public as the true "appeals level." It is the level at which the citizenry has the first, and indeed the last, chance to present its case to an Administrative Law Judge sitting as an independent judicial officer, who is by law clothed with decisional independence as provided by the Social Security Act and the Administrative Procedures Act.

We recognize significant problems exist in the operations of the lower level of determination, most often referred to as the "Reconsideration Determination" level. It is our conviction, however, that unless the problems are resolved at the hearings and appeals level which provides the only "due process" hearing before an independent fact finder, reform at the lower levels will not be as easily accomplished or as meaningful. Additionally, we must recognize the constraints of time and space which prohibits a detailed discussion of problems occurring at the other level. In the interests of dealing with the particular problems in the hearings and appeals process, with which we are most familiar, and to avoid the impression that we are criticizing any other component, we submit the following for your consideration.

The primary purpose of the Disability Advisory Committee's announced study, as stated in the notice of these proceedings, is "to study the Social Security Administration Review process (known as the "appeals process") to ensure that the process protects the rights of the claimants, produces accurate and swift decisions, and is viewed as fair and equitable." The announced purposes are in conformity with and the same as those stated by the Commissioner of Social Security in announcing a comprehensive review of the appeals process in January 1989, to "identify areas which need reform in order to ensure that the appeals process is fair, compassionate, efficient and more timely" (Memorandum dated January 20, 1989 from Louis B. Enoff, Deputy Commissioner for Programs to the SSA Executive Staff, titled "Reform of the Appeals Process--A Three Pronged Approach").

Our Association welcomes a study of the problems in the hearings and appeals process and we share the widespread concern expressed by many legal authorities, the courts, Congressional members and informed authorities that the appeals process, as presently administered by the Social Security Administration, is having significant problems that endanger the due process rights of the citizenry seeking benefits under the provisions of the Social Security Act.

A need for substantial reform in the appeals process has existed for many years. It is noted that one commentor on the problems, in a paper filed with your committee, stated that over the years both executive and legislative branches have recognized and attempted to address the problems, but only on the basis of a "quick fix for the current crisis" and the long term and underlying problems have not been meaningfully addressed.

Illustrative of misguided attempts at reform are the regulations prepared by the Social Security Administration providing for changes in the hearings and appeals process before Administrative Law Judges.

Those proposed draft regulations met with extreme opposition and objection from Congressional members, citizens, newspapers and legal organizations to such a point that the Chairman of the House, Ways and Means Committee called an immediate hearing before the full committee, which was held in December 1988. So great was the uproar and opposition, as illustrated by the fact that over thirty Senators sent personal letters of protest to the President of the United States, that the Commissioner of Social Security, Dorcas Hardy, announced on the Saturday before the Monday of the hearing that she was rejecting totally the regulations because they had "generated inaccurate information and caused undue alarm to the American Public," and because the proposals did not meet "...her criteria of making the system more equitable, compassionate and efficient."

The present study must be commenced, therefore, with a keen awareness that the solution of any of the problems at the Administrative Law Judge appeals level cannot and should not be addressed with proposals similar to those already rejected by the Commissioner and the public, as reflected in the regulations that were discarded.

Additionally, the Committee should be aware that at this time the General Accounting Office (GAO) is in the process of compiling information from an independent survey and study of the problems in the hearings and appeals level for a report to Congress to be issued no earlier than September 1989. This study was requested by the Chairman of the House, Ways and Means Committee, the Honorable Dan Rostenkowski, in response to numerous complaints alleging improper and illegal pressures being brought to bear on Administrative Law Judges by agency management officials. It is hoped that your committee would recognize the importance of withholding the formulation of any opinions or recommendations to the Commissioner as to reforms in the Administrative Law Judge hearings and appeals process until such GAO report is published and you are afforded adequate opportunity to consider its ramifications as they bear upon the information you may already have obtained.

Illustrative of agency actions and policies about which Administrative Law Judges have complained to our Association are the following examples.

1. Improper assignment and reassignment of cases to Administrative Law Judges in violation of the strict rotational requirements dictated by the provisions of the Administrative Procedures Act (APA).

2. Removal of necessary supervisory authority from individual Administrative Law Judges and redelegation of such authority to agency management officials.

3. Removal of blanket travel authority which previously permitted Judges to schedule cases at travel sites for hearing and disposition of their sole discretion, and requiring Judges to obtain separate travel authorizations for each trip in advance and conditioned upon the Judge's agreement to schedule a certain number of cases in and for a certain period of time.

4. Delegation of the Administrative Law Judge's decision-writing function to staff attorneys and non-attorney decison writers that are selected by the agency without the consent of the Administrative Law Judge.

5. Requiring specific agency-approved format language to be used in decisions issued by the Administrative Law Judge.

6. Subjecting individual Administrative Law Judges to supervision and direction of Regional Chief Administrative Law Judges and Hearing Office Chief Administrative Law Judges in the manner and method they perform many of their <u>judicial</u> functions.

7. Frequently published agency directives and policies ordering Administrative Law Judges to disregard court interpretation of the law, unless specific "Aquiesence" rulings have been issued by the agency (Non-Aquiesence).

8. Establishment of numerical performance "goals/quotas" in the number of cases, scheduled, heard and decided each month by individual Administrative Law Judges.

9. Numerical Performance Standards established and enforced on members of the professional support staff assigned to prepare decisions in written form for the Administrative Law Judge.

10. Agency statistical and tracking systems and time-consuming reports coding and publishing aspects of the individual Administrative Law Judge's performance of his judicial functions forming the basis of ranking, rating and evaluating such Judge's performance in comparison to national, regional and hearing office averages and for purposes of rating and evaluating the performance of the individual Administrative Law Judge.

11. Refusal and granting of requested transfers by Administrative Law Judges from one location to another on the basis of performance evaluations of the individual Judge, i.e., the average monthly disposition rate of the individual Administrative Law Judge.

12. "Bellmon Review" quality review systems established in 1981 for purposes of preparing a general report to Congress in the following year of OHA operations, but expanded improperly to include a review of the performance of individual Administrative Law Judges and evaluation of the individual Administrative Law Judge's allowance and denial rates, as well as tracking the number of times cases issued by the Judge are found in error by the Appeals Council and establishing an own motion review rate for such Judge to be compared with other Judges own motion review rates on a national average basis.

13. "Critical Case Policy" permitting those other than the Judge to whom the case is assigned to give priority handling to cases in processing and allocation of support staff.

14. Mandatory assignment of travel docket cases to individual Judges requiring such Judges to schedule and hear too many cases in too short of a period of time to permit fair procedures, and requiring individual Judges to travel on their own time on weekends without pay and enforcing such mandatory travel dockets with threat of adverse action or reprimand should the Judge elect to refuse such assignment.

The above examples are but a few of the "overmanagement" policies of the administrators of the Office of Hearings and Appeals that have led to much discontent, complaints and accusations by Administrative Law Judges and members of the public that the agency is violating the APA and unduly restricting the Administrative Law Judges in the performance of their judicial functions. Consequently, the required decisional independence that Judges must have to accord the citizens that come before them for due process has been violated.

The problems were addressed in a letter dated June 2, 1988 from the National Conference of Administrative Law Judges in the American Bar Association to the Honorable Dan Rostenkowski, Chairman of the House, Ways and Means Committee, which is attached hereto as Tab A. It contains citations of numerous Congressional reports, legal periodicals and textbooks written on

the history of the longstanding problems in the administration of the Office of Hearings and Appeals which should be of use to your Committee members for reference. As previously mentioned, Mr. Rostenkowski requested GAO to conduct a study of the Office of Hearings and Appeals operations because of numerous complaints Congress has received alleging abuses of the APA by the agency.

A reading of the cited material clearly established that the listed problems are occurring, and have been for many years. The only changes that have occurred reflect that the problem is becoming more serious with each passing year and each passing administration. Considering the long-standing nature and gravity of the problems, it is little wonder that Administrative Law Judges have elected and are now electing to retire rather than continue to work in such an atmosphere of pressure and difficulty.

In a letter dated May 19, 1988 addressed to the Senate Governmental Affairs Committee, a judge retiring at that time, the Honorable C. J. Occhipinti, voiced the same dissatisfaction with the manner and method in which the appeal system was being administered by the administrators of the agency (Tab B). An Administrative Law Judge stated, in March 1989, as his reason for retirement from the Department of Health and Human Services, Office of Hearings and Appeals, "My principal reason for retiring is that the Social Security Administration has always opposed the APA hearing process, which is mandated by the law. SSA has at least since 1974 carried on a systematic campaign of harrassment, insult, and intimidation against the Administrative Law Judges..." That even one judge should have such an opinion of the system in which he or she decided cases is significant. When we consider that his or her opinion is shared by so many other Administrative Law Judges, as clearly reflected in many of the sources cited as well in the testimony of the judges before Congressional Committees in 1975 1979, 1981, 1982, 1983, 1985 and as recently as 1988, is alarming.

That the problems continue and are of an alarming nature is evidenced by a letter of as recent date as March 27, 1989 from Administrative Law Judge Richard Sprague to the Office of Personnel Management. It documents clearly that there are clear indications that OHA management officals are both directly and indirectly violating the provisions of the APA and the provisions of the official position descriptions of the Administrative Law Judges. In pertinent part, this provides, "The Social Security and Administrative Procedures Acts prohibits substantive review and supervision of the administrative law judge in the performance of his quasi-judicial functions of holding hearings and issuing decisions...He is subject only to such administrative supervision as may be required in the course of general office management...(Position Description for Administrative Law Judge (Licensing and Benefits) GS-935-15 August 26, 1985) Section III. Supervision and Guidance page 3)."

As the concerns of your Committee are addressed to recommending reforms that ensure the rights of the claimants are being protected and that the appeals process is viewed by the public as fair and equitable,

recommendations would be in order from your Committee to the Commissioner which are designed to prevent and stop the abuses. In the past few years, several bills have been introduced in both Houses of Congress to address such abuses. They provide for the separation of the Administrative Law Judges from the supervision and administration of the Social Security Administration and the establishment of a separate Corps of Administrative Law Judges. This legislation would have established a "Unified Corps" of Administrative Law Judges in which judges from all Federal agencies would have been housed, separate and apart from the agencies they now serve and a "Review Commission" which would have housed only the Administrative Law Judges now presently serving the Social Security Administration. Our Association has issued statements in support of the "Unified Corps" and Administrative Review Commmission legislation as a solution to the problems experienced in the Social Security Administration appeals process and similar problems experienced by other Administrative Law Judges employed in other agencies.

The separation of the Administrative Law Judges from a dependent position and employee status with the agencies and the establishment of the judges in a truly independent judicial position would do much to ensure the protection of the rights of the claimants and enable the public to perceive that appeals before Administrative Law Judges are truly fair and equitable.

At the writing of the paper, however, such proposed legislation appears to be stalemated. There is little certainty as to if or when such legislation would be passed by both Houses of Congress and ultimately signed by the President. For obvious reasons, such legislation has not had the support of the agencies and their passage will be difficult.

Your Committee could do much to persuade the agency that either of such proposed legislation would establish a truly independent and fair hearing process that would be available to the agency and would put an end to long-standing accusations made against the Social Security Administration and the appearance that they are controlling the decisional outcome of the cases by pressuring the Administrative Law Judges, both directly and indirectly, through administrative manipulation. Your Committee should recommend to the Commissioner that she support such legislation separating the judges from the agency in the interests of her announced determination to make reform that will be not only perceived by the public as establishing fair and equitable proceedings to handle the appeals of the agency but, in fact, will be.

In the event that such legislation proposed does not show promise of immediate passage, which most certainly appears to be the case at this time, an interim reform is nonetheless needed to solve the problems as cited in this report. This would only require actions on the Commissioner's part that do not require enabling legislation. They are within the Commissioner's authority or that of the Secretary of the Department of Health and Human Services to publish and adopt regulations to further implement the provisions of the Social Security Act. The following recommendations are respectfully submitted as reforms that could be implemented by the Commissioner of Social Security or the Secretary of Health and Human Services.

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Recommendation No. 1: Increase the number of Administrative Law Judges sufficiently to handle the increased workload which has steadily increased and shows no signs of relenting.

The number of Administrative Law Judges on duty in the Office of Hearings and Appeals has been allowed through inaction and untimely action of the Social Security Administration to fall far below the number needed to properly and fairly process the cases. The following statistics clearly show that there has been no correlation between the increasing case load and the number of judges on duty which have remained approximately the same since 1975 with the exception of one year in which the number of judges reached an all time high of 810.

The present number of judges on last report in March 1989 is only 702, and this number was only accomplished by the hiring of 110 additional judges in 1988. Apparently, the Social Security Administration permitted the number of judges on duty to drop to a 14-year low in 1988 since the hiring of the 110 only brought the number to 702. Simple subtraction shows that the Social Security Administration permitted the number to fall to only 598 in the year 1988 when the requests for hearing numbered 290,393. In retrospect, when you consider that in 1976 the Requests for Hearing or cases for that year only numbered 157,688 and the judges numbered 637 at that time, there is something definitely wrong with management policies that would permit this extreme reduction in judges to occur at a time when the need for judges had escalated sharply as reflected by these statistics.

This failure to have enough judges has predictably caused an extreme strain on the system and on the judges themselves. In 1981, the then Associate Commissioner in charge of the Office of Hearings and Appeals told Congress that no less than 800 judges were needed to handle the case load. For unexplained reasons, the Social Security Administration has failed to maintain that needed number and has, at times as can be seen from the above, let the number fall by as much as 200 judges.

A fair characterization of what the agency has been doing, however, is one of simply ratcheting up the expectation of the number of cases that each judge must dispose of as the agency lets the number of judges fall to dangerously low levels. The resultant pressure and demoralization of judges who are expected to do more and more, with less and less, has also led to early retirement of many judges and transferring of judges from SSA to other agencies whenever they can. This has further aggravated the problem of the lowering number of judges and becomes increasingly dangerous.

It should be noted that when the previous Associate Commissioner predicted that at least 800 judges were needed, he made such projection on the basis that each Administrative Law Judge could process and dispose of 45 cases per month. That projection has not proved valid, as the present Associate Commissioner has indicated that even the accomplishment of 37 cases per month per judge would be an accomplishment and it has not been sustained for any significant period of time to this date.

Logically the number of needed judges is even higher for the handling of 290,000 cases than the 800 projected by the Associate Commissioner in 1981. Additionally, major changes in legislation making the processing of such cases far more time consuming and complex can reasonably be expected to reduce the ability of the judges to dispose of more cases in the future than they are now.

SSA's failure to maintain an adequate number of Administrative Law Judges on duty as aforesaid is further cause of escalating problems in the handling of cases on a nationwide basis. The lack of sufficient judges has caused wholesale shipment on large numbers of cases from one area of the country to another and as well caused Administrative Law Judges who ordinarily travel within areas of their assigned geographical responsibility to go to other regions of the country, and in many cases neglect the cases in their own jurisdictions.

The handling costs of the transfer of those cases unnecessarily from one section of the country to another and the enormous costs of travel and per diem required by the Administrative Law Judges to travel far greater distances than they ever have and stay for longer periods than they did in the past have increased the cost per case in administration, leaving less money for needed services. The National Organization of Social Security Claimant's Representatives echoed this concern when in the paper submitted to your Committee it stated, "We see a need for better distribution of members of the ALJ Corps. Right now some hearing offices are experiencing backlogs, because of long standing vacancies of judges. Other OHAs with vacancies have avoided the development of backlogs by relying on visiting ALJs from other OHAs. Neither situation is desirable on any long term basis. Filling vacancies promptly, and hiring more Administrative Law Judges if necessary, should be a priority. This would enable claimants to have their cases heard more promptly."

It is obvious from the above that if the claimants are to receive more swift decisions and be treated more fairly and equitably, this defect must be remedied. An increasing case load needs more judges, and SSA has not provided them. Rather, it has attempted by managerial manipulation and increased management techniques to supplant judges with quick fix procedures, and it has not worked. The Judges Corps must be increased and substantially. If 637 judges were justified to handle a case load of 157,000 in 1976, what should a case load of 278,000 require in 1989? It could be logically argued that the number of judges should be increased not to 800 but indeed to a figure much higher, as 1,000 judges would not be too many if weighed with the interests of a speedier and more efficient handling of the cases in mind.

Recommendation No. 2: Increase the number of essentially needed support staff members to a true five to one support staff ration to the Administrative Law Judges and discontinue staff reductions.

As in other components of the Social Security Administration, the Commissioner of Social Security has been implementing staff reductions in the Office of Hearings and Appeals, ostensibly in response to projected budget

cuts. These cuts are having a deleterious effect on the operations of the system, are causing the citizens to have to wait much longer for disposition of their applications, and are as well causing numerous mistakes to be made in the processing of the cases. It has long been recognized that the Administrative Law Judges need increased numbers of support staff members to assist them in the processing of an ever-increasing number of cases. In 1976 when the number of requests for hearing were 156,000, the support staff ratio was 3.6 to each Administrative Law Judge. In spite of representations made to Congress in 1981 that the support staff ratio would be increased to at least a five to one ratio, SSA has failed to meaningfully increase the support staff ratio. In 1987, the number of requests for hearing were approximately 278,000 and 290,393 in 1988.

These figures were taken from published operational reports of the Social Security Administration and should be reliable. Yet, there are factors not reported in these naked support staff ratio statistics. Bad as they are, they make the failure of the Social Security Administration to provide needed support staff to the Administrative Law Judges even more apparent. What the statistics do not reveal is that the office organizational structure in the Office of Hearings and Appeals has been dramatically changed by SSA management. In 1976 when the first statistics of support staff ratio were cited above, the support staff was directly assigned to the individual Administrative Law Judge who totally directed and supervised them on a daily basis in doing the work on the cases.

This system was known as the "unit" system. Each Administrative Law Judge was assigned a unit of support staff members. Unfortunately, this system was perceived by agency management official as "insulating the administrative law judge from control of the agency."

A campaign was begun by administration officials to discredit the efficiency of the "unit" system and the Administrative Law Judges who managed the units. Agency management went so far as to "bribe" offices with promises of additional support staff and equipment if they would voluntarily "convert" to what was then known as a "reconfigured" or "pool" system of operation. Ultimately when voluntary conversions by these methods no longer worked, agency management ordered the institution of such office structures thereby totally removing the support staff from assignment to individual judges. They supplanted the supervision and direction of the judges with those of agency managers to whom the support staff members were assigned and became accountable to. The "unit" system was no more. Importantly, when this occurred, it was no longer meaningful to speak of support staff ratio to Administrative Law Judges. The agency, however, persisted and persists in speaking of ratios of support staff members to judges when this is not statistically correct. The true support staff ratio of office members to individual Administrative Law Judges is now zero to one as the result of the "pooling" of the staff. The staff now supports management and not the judges.

Another factor not revealed is that, included in the number of employees in the hearing office used in determining the support staff ratio, are "supervisory" employees that never existed before. Their primary function is to supervise the worker employees. Their numbers are not separated from the total. Therefore, when the agency speaks of support staff ratio, it is not speaking truly of support staff ratio to judges, and they include "managers" or "supervisors" who arguably are not support staff at all in the true sense of the word.

The change in the system as aforesaid did solve the problem as agency management perceived it to be and removed all insulation of the "unit" system that permitted the Administrative Law Judges to act independently of the agency in the processing of the cases and its control. With the inception of the "reconfiguration" system, the Administrative Law Judge was no longer insulated, but rather became isolated from the system with great adverse effect. Examples of the adverse effects of such isolation are too numerous to list in the confines of this paper and have been documented in many of the studies and Congressional hearings with which this Committee should be familiar.

Adding to the adverse impact of this organizational change, the actions of the Commissioner of Social Security in instituting hiring freezes, which is still in effect declining to fill vacancies as they occur in the support staff member ranks in the hearings offices over the past year have been devastating. It is fair to say that these actions are the result of attempts to establish "national cuts" and "national budget changes" for the entire Social Security Administration, with no distinction of each component's needs or the relative importance of the components in the work they do. The cuts and reductions are painted with a "broad brush" and fail to treat the details of the hearings and appeals system so important to due process. Rather these cuts and reductions are submerging the hearings and "appeals system's" ability to afford due process.

The lack of needed support staff in the offices, as a result of thse cuts, have caused many adverse conditions to swift handling and fair processing of the cases. The following is but one example: Case files are being shipped from the office ordinarily responsible for preparation of the case to other offices hundreds of miles away that have more personnel. Importantly, the cases are being prepared far from the direction and control of the Administrative Law Judge to whom the case is assigned and his or her ability to control the manner and method in which the case is processed and prepared for hearing and/or scheduled, is frustrated, if not completely destroyed.

The problem as aforesaid can be resolved. First, the agency must discontinue its policy of staff reduction in the Office of Hearings and Apeals and fill vacancies swiftly as they occur. Hiring freezes should and must be discontinued. Second, the agency must make organizational changes in the office structure of each hearing office to establish a true support staff ratio of at least five employees assigned to each Administrative Law Judge. Direct assignment to the judge is essential so that he or she has effective and meaningful control over the employees doing the clerical and legal work on the cases assigned to the judge.

This effective and meaningful control can be accomplished, as it was in the past, by restoring the direct assignment practice and providing that each Administrative Law Judge have support staff members, as described below, assigned to him or her:

(1) Staff Attorney or Analyst, GS-12
(2) Hearing Assistant, GS-7/8
(3) Hearing Clerk (Docket Clerk), GS-6
(4) Secretary, GS-4/5
(5) Clerk Typist, GS-3

In this manner, a true five to one support staff ratio to the judges would be accomplished, as promised to Congress in 1981. Considerable financial advantage as well will inure as a result of these changes. It will no longer be necessary to have so many higher-graded supervisory members in each hearing office, because the GS-15 Administrative Law Judge will be the immediate supervisor, rater and evaluator of the performance of the work being performed by the employees assigned to him or her. This will not cost the government anything additional and will permit conversion of costly supervisory slots now existing to support staff positions dedicated to actual work on the files.

Recommendation No. 3: Reduce the number of unnecessary administrative personnel in management layers housed in the ten Regional Offices throughout the country and convert such position allotments to meaningful support staff in the 134 hearing offices.

The number of personnel in the Regional Chief Administrative Law Judges Offices, which number ten in the country, have increased dramatically in the past few years. For the most part, such offices are involved in administrative, record keeping and report gathering activities duplicated at other levels in the Office of Hearings and Appeals structure. Recent automation of the reporting system and centralization thereof dispense with the need of these numerous offices and the many people assigned to tasks that are centrally handled by computer systems directly with input from the hearing offices themselves. Additionally, much of the record keeping activity and reporting requirements imposed by such Regional Office structures to justify their continued existence is unnecessary, time consuming, costly and of little effect. Importantly, the Regional Chief Administrative Law Judges staff do not support the work of the hearing office any longer, but have assumed a posture of directors of the work, perceiving that the hearing offices' functions support the Regional Chief Judges rather than the functions of the individual Administrative Law Judges housed in the various offices in the region.

The nature of such Regional Office positions provide for high-graded GS ratings with much increased cost. When we consider that the activities performed by them are primarily window dressing and do not significantly contribute to the primary mission of the Administrative Law Judges in the processing and deciding of cases, it is a luxury we can no longer afford. Efforts in the past to reduce the size of these offices have proved unavailing, due to the influence of higher level bureaucrats who oppose the reduction of their control systems.

Many of the Regional Offices could be merged into one location, thereby dispensing with the need of so many employees. Additionally, in those Regional Offices remaining, a re-definition of the purpose of such Regional Offices to meaningful pursuits could be accomplished to restore them to their only justified function which is to "support the individual hearing offices" in seeing that they are supplied with needed personnel and equipment.

Recommendation No. 4: Restore yearly blanket travel order issuance to Administrative Law Judges to travel within the region to which they are assigned:

It was a long-established procedure in the Office of Hearings and Appeals in all Regions in the country to issue yearly blanket travel authority orders which permitted the Administrative Law Judges, without prior approval of other agency officials, to schedule hearing trips in areas within the region to which they were assigned in such numbers as they deemed appropriate for hearing during certain periods of time. It was also a part of that policy to permit each Administrative Law Judge to maintain a travel advance to be used for such trips and to account for same at the end of such period, or request additional funds during that period if the advanced funds were exhausted in travel. Ostensibly for "budgetary" reasons, it was represented by the agency that it would be more efficient to discontinue such advances and blanket travel authority and to require instead that the Administrative Law Judge prepare and submit a separate request for travel authority each time. This has compounded inefficiency and required more and more administrative actions than ever before, delaying travel orders and advances to the point that there have been actual instances where judges could not travel to hold scheduled hearings because the authority to travel and/or the advance of funds were not forthcoming in time. Talk about waste and inefficiency, this is a paramount example.

The solution is a simple one. Restore the blanket yearly travel authorization and travel advance so that the Administrative Law Judge's flexibility in travel planning can be enhanced instead of encumbered as it is now. There can be only one reason for refusing to make this change, and that would be if the agency did not trust the judges to be honest or efficient. We would hope this would not be the case; but if it is, we would wonder how, if such distrust exists; that the agency could trust the processing of the cases and the ultimate decision of disbursement of Social Security trust funds to a group they can trust no more than that.

Perhaps the agency perceives this obfuscated travel approval authority procedure now in place is an indirect method of controlling the number of cases a judge schedules for hearing on a trip. It would indeed prove useful for that purpose, if that's what its intent is. If a judge cannot receive travel authority to schedule and hear cases in the number he or she deems maximum for handling, he or she certainly may be coerced into scheduling the number the agency requires before travel authority is granted. Besides being a violation of a settlement agreement that the agency itself entered into in 1979, providing it would not set a minimum number of cases required to

permit travel authority, it is a violation of the fairness the system is supposed to supply to claimants. It is not fair to the interests of the claimant's case to force a judge to schedule more cases than he or she believes he or she can hear with fairness.

In conclusion, for all of the above reasons, this travel authority practice of the agency should be reformed both to save administrative cost that is unnecessary and to restore fairness to the travel docket scheduling.

Recommendation No. 5: Remove actual and apparent policies which permit Hearing Office Chief Administrative Law Judges (HOCALJs), Regional Chief Administrative Law Judges (RCALJs) or Chief Administrative Law Judges (CALJs) to supervise and direct individual Administrative Law Judges in the performance of their enumerated quasi-judicial functions.

In the past few years, managerial systems have been implemented by the agency delegating supervisory and directive authority to "manager judges" over each and every individual Administrative Law Judge. While the official position descriptions on the individual judges specifically provide that they shall not be subject to such direction and control and may only be subject to supervison in general office management matters, the agencies policies have gone far beyond that and intruded into the functions of the judge that must be exercised independently of agency control. Under these newly established systems, "manager judges" perceive and are instructed to believe that they, in fact, are the supervisors of the judges and may dictate to them the manner and method in which they should process a case even to the point of directing a standardization of the way judges should perform their enumerated functions. Such direction and control by a person not assigned to the case and who is a "management official" of the agency, not protected in his position of management by the Administrative Procedures Act, is unauthorized and should be discontinued. The reasons are obvious for the conclusion that such "management practices" being inappropriate for a "due process system."

In this pursuit, the agency has met little or no opposition from the Office of Personnel Management and has reportedly succeeded in gaining authorization of a grade difference of GS-16 for Regional Chief Administrative Law Judges on the basis that their positions, recently amended, are now "directory" of the judges, rather than advisory as they had been perceived.

Recommendation No. 6: Discontinue agency practice of "Non-Aquiesence" in holdings of Federal District and Appellate Courts.

For many years, the Social Security Administration has been harshly and justly criticized for its policy of defying court interpretations of the Social Security Act law. The most obvious example of such defiance is the policy which the agency insists is their prerogative of "Non-Aquiesence." In other words, if the agency does not agree with the court interpretation of the law, they simply direct all of their components to disregard such court interpretations in other cases, even with the same jurisdiction of the court's ruling.

This has led to understandable objection from the Federal Courts and legislators who are keenly aware that it is the Courts of our land that interpret the laws and that bureaucratic agencies cannot be permitted to overrule court interpretations else anarchy result. Case in point is the Hyatt Class action case which has embroiled claimants and the agency alike in the state of North Carolina in such difficulties. (See conclusion)

This policy, besides being the laughing stock of legal authorities, does great discredit to the Social Security Administration and more importantly creates one level of justice for those claimants who can go to the Federal Courts, and another for those who can't.

It, like many other ill-advised policies of the Social Security Administration, was criticized in the passage of the 1984 disability reform legislation. In spite of that criticism and the passage of four years, the agency has done nothing concretely to reform this improper policy.

Recommendation No. 7: Discontinue "critical case policy" of the agency as implemented and which permits agency officials not assigned to the case to determine the manner and method in which the case will be processed.

This initiative was ostensibly implemented to speed the processing of cases where financial need was evident in the case. Unfortunately, at least 60 percent of the cases involve financial need, yet the policy was applicable only to cases where either Congressmen or agency officials directed that preference be considered. In many instances, the Administrative Law Judge to whom the case was assigned was neither consulted or asked if such preference should be afforded; and such authority was delegated to, in many cases, non-judge management officials to make the determination. The case policy was fatally flawed in this respect and should be discontinued, as it permits agency interference with the Administrative Law Judge's handling of the case to which he or she is assigned.

Recommendation No. 8: Discontinue agency management policy of establishing and enforcing numerical quotas and/or standards of performance in the number of cases to be scheduled, heard and decided by individual Administrative Law Judges on a monthly basis.

The controversy over the practice of the agency has been present at least since 1975. In 1979, a Congressional subcommittee on Social Security concluded that, because of such "quota and goal" management policy in numbers, the agency had put more emphasis on quantity and less on quality of justice and that the system had suffered because of these policies. Ten years later, the same policies are being pursued unabated and indeed more vigorously than ever before as illustrated by the fact that the agency filed charges to remove judges who had not accomplished a certain disposition rate per month with the Merit Systems Protection Board. In spite of the fact that all of these actions were found ill-founded by the MSPB and the agency had to pay hundreds of thousands of dollars in attorney fees for the unjustified actions they took against the judges charged, the agency persists in such policies of numerical quota and goal enforcement.

In a letter as recent date of April 19, 1989, the Associate Commissioner Eileen Bradley directed comments to an Administrative Law Judge complaining of "quota enforcement" implicitly approving management actions to enforce quotas and/or goals and/or numbers on the judges as not being an infringement on judges independence, but rather "reasonable efforts" to increase the levels of performance of the Administrative Law Judges. This problem of misunderstanding by the high level bureaucrats and the perceptions of the Administrative Law Judges needs to be resolved. It can only be done if it is addressed. To this point, the agency has refused to address the problem. Either Congress was wrong in 1979 or the agency is wrong. They cannot both be right. In 1979 when the finding was issued by the Congressional Committee, the quota was only 26 decisions per month per judge. Now it is 37 per month per judge. Is it logical that numerical pushes for 26 per month could be damaging to the system then, and pushes for 37 per month now would not be.

Additionally, the agency has, since 1979, set a whole new list of quotas and goals. Not only do they establish them in the number of decisions to be issued per month per judge, but have expanded such management pressures to setting goals and/or quotas in the number of cases to be scheduled each month per judge, the number of cases to be heard each month per judge, the number of continuances to be granted each month per judge, the number of aged cases a judge should have on his docket each month --- the list goes on clearly demonstrating that if nothing else is true, this supposed due process sytem is managed entirely by the "numbers." How such a system can be viewed by the public as fair and equitable is a mystery to many. It is obvious that it cannot be viewed as fair, and has not been. This has been illustrated by newspaper articles criticizing the agencies for such tactics.

If these practices were eliminated, much of the needless paperwork, reporting, statistical game-playing and number management practices of the agency, which costs so much in support staff time and money, could be eliminated. The resources saved could be used to hire more support staff and pay for better equipment that would go further than all of the improper pressures being exerted to achieve swifter case processing, treating Administrative Law Judges like children and putting them against one another. Putting them in fear of their jobs by asserting performance requirements on them as "minimally acceptable levels" would not seem to be necessary if they are, as described by the Associate Commissioner, demonstrating a high level of performance and professionalism and meeting the present challenge. On the other hand, if such management tactics are required, then there is indeed something seriously wrong with the professionalism of the corps of judges and that, as well, should be examined. We are confident that investigation will bear out the fact that agency management has landed on the numerical drumming policy because it is the easiest front to pressure as "efficient managers" because it deals with numbers and not justice which is difficult to quantify. While the judges are concerned with fairness and due process, agency management appears to once again be pushing quantity at the cost of due process. In any event, the management tactic was discredited many years ago and should be abandoned.

Recommendation No. 9: Exempt staff attorneys, analysts and other professional staff assigned to do work on the cases assigned to Administrative Law Judges from numerical performance standards on quotas, as such work cannot be quantified in numbers.

Specific authority in OPM regulations permit such exemptions. Our Association in 1980 recommended such action at a time when the agency announced it was going to establish numerical performance standards or quotas for staff attorneys. The judges objected then as it was "unprofessional" to exact a numerical standard of performance from those entrusted to doing legal research and who, in many instances, prepared drafted decisions under the direction of the Administraive Law Judge. Those recommendations were summarily rejected by the agency and have been in place with much adverse effect. They should be discontinued to restore the quality of the decisional product by freeing professional support staff from number constraints that are incompatible with due process in performance of legal work.

Recommendation No. 10: Discontinue case tracking and evaluation of individual Administrative Law Judges Performance under the guise of "Bellmon Review."

Perhaps no other action of the agency has been more troublesome than this. In 1980 when the Bellmon Review legislation was passed, it was clearly intended to require the Social Security Administration to study the cases decided and to report to Congress on decisional defects and causes of discrepancies between adjudicatory levels in the outcome of the cases. The agency instituted individual performance reviews of judges on the basis of selecting only those judges whose allowance rates were higher than the acceptable norm established by the agency's 66 and two-thirds percent. As a consequence of such reviews, judges were counseled and attempts were made to "modify their behavior" to bring them to a "more acceptable" level of allowance rate. As the result of litigation, this practice was represented as being stopped, but nonetheless extremely criticized by the deciding court in the case of Association of ALJ's v. Heckler. Because the agency represented the practice was stopped, the Court concluded that our Association had, by its action, reformed the agency and awarded substantial attorney fees in the matter. Unfortunately, "Bellmon Review" of the performance of individual Administrative Law Judges continues to this day. How this is compatible with decisional independence is clearly questioned. Additionally, such actions of the agency are not justified by the legislative intent of the Bellmon amendment. The agency does not need to know individual performance of judges to report to Congress on decisional trends. (See Cohen and Levin Report, Subcommittee on Government Management, U.S. Senate, September 1983, Tab C.)

A close scrutiny of the agency's actions are clearly called for at this time in this area. The perception of the judges is that the improper aspects of "Bellmon Review" continue. This perception can only be erased by full disclosure of the actions in this area by the agency.

Recommendation No. 11: Restore case assignment of Administrative Law Judges to cases on a strictly rotational basis.

The APA and due process under the Social Security Act require assignment of judges on a strictly rotational basis. This strict rotational assignment prevents the agency from selecting certain judges to hear cases and thereby, in many instances, control the outcome of cases. The agency does not enforce strict rotational assignment and permits wide deviation therefrom.

Recommendation No. 12: Prohibit removal and reassignment of cases from one judge to another, except with consent of the judge from whom the case is removed except in certain situations.

For many of the same reasons, and additional ones, cases should not be removed from a judge once assigned. The obvious reason is that once a case is assigned to a judge, it is within his or her jurisdiction, and no one elses. He or she is required to perform actions in such cases and has custody of the case. Removal of the case from him or her for frivolous or unnecessary reasons should not be permitted. Additionally, under no circumstances should a case be removed once it has begun to be processed by the judge and/or has been heard and is awaiting decision. The following situations should be those only that permit removal without consent:

1. Order of the Appeals Council or court.

2. Inability of the assigned Administrative Law Judge to act due to prolonged illness and absence or in the event of the death of the judge to whom the case is assigned.

Recommendation No. 13: Reform transfer policy of the agency.

At the present time, announced criteria for approval or disapproval of transfer requests by judges from one location to another includes consideration of the judge's performance in numbers of decisions issued per month. This practice should be eliminated and the criteria should be removed. While it is recognized that the criteria is couched in obscure language of considering the "needs of the receiving office," the basis of the criteria is obvious as a production factor consideration. Such criteria is incompatible with the professionalism of the Administrative Law Judge's position. If a judge is on duty and acting, it must be assumed that he is qualified to be transferred to any office needing a judge, unless we are willing to permit the production of a judge to be pivotal. At the present time, numerous examples can be cited of the effects of this transfer policy. Judges who need transfers have been denied them because their performance in numbers has not been perceived as "acceptable." On the other hand, judges have been transferred time and time again if their production is very high. Most judges are certainly aware of such transfer policies. This awareness further aggravates the damage of management by the numbers.

CLUSION

As can be seen from the inf stated in this report, the fairness of the appeals process in the Off Hearings and Appeals is being seriously compromised. Improper pre: e for increased production and organizational changes made to the end of orcing the individual Administrative Law Judges to meet numerical "goals" and/or "quotas" have wreaked havoc with any reputation the system may have had for fairness and due process. Meaningful reform will not occur as the result of discarding the right of the citizens to have a hearing before, and a decision from, an independent Administrative Law Judge and replace it with the right to have a hearing before a "mere employee" of the Social Security Administration who acts much as a "claims examiner" would at for his employer, an insurance company. Neither does the solution lie in permitting non-lawyers or staff attorneys who are not protected by the Administrative Procedures Act to assume the role and function of the Administrative Law Judges in holding pre-hearing conferences, making on-the-record decisions or disposing of matters preemptorily, based upon their judgment of the merits of a case before it is heard by an Administrative Law Judge. Some may even advocate abandonment of hearings before Administrative Law Judges and providing only that a claimant has the right to have a record of a meeting before a non-lawyer SSA employee reviewed by an Administrative Law Judge to determine whether an "error of law" has been committed. A paper appeal, as this would provide, is neither compatible with, or proper for, legal and factual decisions concerning human beings. It would not convert such non due process hearings into due process hearings just by providing for an appeal on paper alone to an Administrative Law Judge.

The advocates of such changes as outlined above ignore two basic facts. The first is that the opportunity for a face-to-face full evidentiary hearing before an Administrative Law Judge is the most important right a claimant has in the appeal of a denial of a claim and the fact that "It is only at this level that the claimant has a face-to-face hearing with an adjudicator whose independence in decision-making is assured" (National Organization of Social Security Claimants' Representatives report to the Committee dated March 30, 1989, Administrative Hearings page 2). It is, after all, the Administrative Law Judges in the Office of Hearings and Appeals who have the best reputation for protecting the rights of the claimants. The records of Congress and the courts are replete with examples of how, on many occasions over the past ten years, it has been the Administrative Law Judge, individually and collectively through orgaizations such as ours, that have safeguarded the rights of the claimants and given them continued hope that there is fairness and equity in the system. To advocate or recommend changes that would diminish the role of the Administrative Law Judges or make their function obsolete in the interests of "efficiency" would be a far cry from the demands of "due process."

On the other hand, the recommendations we have submitted call only for the dismantling of excessively layered bureaucratic management systems that have impeded the decisional independence of the Administrative Law Judges. The recommendations, if implemented, would restore the Administrative Law Judges to the proper role of being guardians of the fairness of the system with the attendant authority and power to make such change meaningful.

Attendant to the Committee's stated purpose, Supra and intertwined with the overall hearing process (and possibly its demise), is the "fall out" which will result from Hyatt, et.al v. Sullivan. To refresh the Committee's memory, an Administration policy decision of non-acquiescence with the 4th Circuit Court of Appeals law with reference to pain, hypertension, diabetes, resulted in the denial of claims for benefits of residents of North Carolina from July 7, 1981 through May 31, 1987 (a class of approximately 77,000 members). In a paper prepared by this Association's president for the Congress in April 1988, it was estimated that if certain suggested options were exercised (which were not), it would take approximately two and one-half to four years to adjudicate Hyatt (Tab D). The enormity of the problem was recently stated by Honorable James B. McMillan, USDC, on April 14, 1989, when he ordered a stay pending disposition of appeal (Tab E), "...this case is important; it involves many thousands of plaintiffs in North Carolina, and potentially the entitlement of millions of plaintiffs all over the country to many billions of dollars" (emphasis added). The Hyatt case and its attendant multifacet adjudicatory and logistical problems are just the tip of the iceberg. Once Judge McMillan's order(s) are affirmed on appeal, and rightfully so, and he orders the Administration "to crank up the review and re-evaluation process...," will something be done. A band-aid temporary fix of the overall appeals process, as we now know it, will be useless. A change of major proportions will, of necessity, evolve.

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June 2, 1988

Honorable Dan Rostenkowski, Chairman
House Ways and Means Committee
Rayburn Office Building
Washington, D. C. 20515

Attention: Mr. Tom Sneringer

Dear Mr. Chairman:

Judge Richard Sprague, an Administrative Law Judge (Judge) with the Office of Hearings and Appeals (OHA) in the Social Security Administration (SSA), has advised me that you are requesting information with respect to continuing allegations that the SSA is improperly administering the hearings and appeals system and thereby adversely affecting the ability of the Judges in that system to perform the judicial functions of their office in such a manner that they are unable to provide fair hearings to the citizens who appear before them.

As an elected member of the Executive Committee of the National Conference of Administrative Law Judges (NCALJ) of the American Bar Association, and Chairman of the Health and Benefits Section of that organization, I welcome your interest. Information we have received from many Judges in the employment of SSA, and that I have received in my capacity as President of the Association of Administrative Law Judges in HHS from 1982 to 1985, and thereafter as Immediate Past President, convinces me a thorough investigation of these complaints, as you intend, is needed and long overdue.

Documentation of SSA's continuing criticized actions in this area since 1975 is voluminous, and can be readily found in various prestigious publications and reports. I refer your staff to the following Congressional Committee reports for significant proof of complained-of interferences:

Social Security Administrative Law Judges: Survey and Issue Paper. Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives, Al Ulman, Chairman. Washington, D. C., U.S. Government Printing Office, 1979.

Social Security Hearings and Appeals: Pending Problems and Proposed Solutions. Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives, J.J. Pickle, Chairman. Washington, D.C., U.S. Government Printing Office, 1981.

The Role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program. Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate. William S. Cohen, Chairman. Washington, D.C., U.S. Government Printing Office, 1983.

There are, as well, non-governmental publications on the subject which will be useful to you in your pursuit. A most concise bringing together of all of the pertinent information on the subject can be found in a book entitled Judges, Bureaucrats, and the Question of Independence. This work was published in 1985 by the Greenwood Press. It was authored by Ms. Donna Price Cofer, a political science academician and noted authority on the subject, who did an intensive study of the problems over many months.

Ms. Cofer has continued her interest in the problem and has published subsequent articles that clearly document the continuation of the problems unabated, and in many instances becoming more serious. These articles can be found in the Journal of the American Judicature Society, December 1986 and June 1987 issues. They are titled:

The Question of Independence Continues: Administrative Law Judges Within the Social Security Administration, and

Bureaucratic Efficiency vs. Bureaucratic Justice: Administrative Law Judges in the Social Security Administration.

The above publications cite numerous examples of agency actions and policies that the Judges have consistently complained interfere with their judicial function, and which are incompatible with the maintenance of a fair hearings and appeals process. They are as follows:

1) Removal of all supervisory authority from individual Judges over the individual members of their support staff and re-delegation of such authority to non-Judge agency management positions whose tenure is not protected or insulated from agency influence.

2) Removal of previously existing blanket travel authority from the individual Judges which permitted them to freely schedule cases for hearings on travel trips at such times and in such frequencies as they determined, and re-delegation of such authority to agency management officials.

3) Removal of individual Judges decision-writing function and re-delegation of such function to "decision writers" consisting of a mix of lawyer and non-lawyer trainees or analysts.

4) Required use of specific format language preformulated by agency officials in the decisions issued by individual Judges.

5) Delegation of supervisory authority over individual Judges in the performance of their judicial functions to Regional Chief Administrative Law Judges (ROALJ) and Hearing Office Chief Administrative Law Judges (HOCALJ), appointed agency management officials who have no Administrative Procedure Act (APA) protected tenure in such positions, and who are subject to the direction and control of the agency officials in the performance of their supervisory functions.

6) Directives and policies which order individual Judges to disregard court interpretations of the Social Security law when in conflict with agency "policy"/.

7) "Critical Case Policy", which permits non-Judge management officials to designate certain cases to be given priority in handling and disposition, and ordering of Judges assigned to such cases to apply such priorities without prior consultation with, or consent of, the individual Judge assigned to the case.

8) Numerical quotas, and/or goals in the number of decisions to be issued each month by individual Judges, and sanctions therefor.

9) Numerical quotas, and/or goals in the number of hearings to be scheduled and held each month by individual Judges.

10) Numerical performance standards applicable to each member of professional support staff who are charged with assisting the Judges in the case preparation and in final disposition of the case.

11) Agency review systems rating and evaluating individual Judge's performance.

12) "Quality review systems" using elaborate and costly statistical tracking systems of individual Judge's performance by personal identifier relating to the number of hearings he holds, continues, allows, denies, uses medical advisors or vocational witnesses as experts, etc., per month, and publication of such information regarding such performance.

Comparison of the above-listed agency actions and policies with the official position description of the Judges, and particularly the enumerated functions cited therein, clearly demonstrates the reason for the expressed concerns and why the the Judges are complaining so strongly. The agency's actions and organizational systems conflict with the necessary freedom of action and control that must be exercised by the Judges in order to carry out the judicial functions of their office and their attendant duties. Their responsibilities are great, as dictated by their position descriptions. Yet,

their authority and power to see that the functions are carried out are reduced to such an extent that they are illusory and non-existent.

A fair appraisal of the history of the problem, and how the agency has dealt with it since 1975 to the present leads to the inescapable conclusion that the solution does not lie within OHA or SSA reform. To begin with, the agency will never admit to a need for reform, and will argue that Judges are "mere employees", only semi-independent and not Judges but "quasi-judges" who should be accountable to the employer, as are other employees. The position of the agency is clear with respect to its attitude and philosophies towards the Administrative Law Judge position. The agency has, in many instances in the past years, made it clear that it is the agency that has a "mission" and that the Judges are just a group of employees who must strive to accomplish the agency's missions as announced from time to time, whatever they may be. Such a philosophy is a far cry from that contemplated by the APA and the decisional independence it was passed to insure.

The agency's only response to past criticism has been to institute management systems that usurp control of the Judges and place such control in the hands of managers. This has made matters worse. Increased "managerial costs" created by the multiplication of manager and supervisor positions with higher grades have been the only result of their actions.

Predictably, the agency will cite statistical records of an increase in the number of cases disposed of and increased "efficiency" of operation based upon such numerical achievements alone, as justification for their acts. Such arguments attest to the agency's philosophical inability to accept the parameters of a fair hearing system with due process, as the law requires. SSA has also clearly demonstrated, by its actions since 1975, that it is so philosophically opposed to the hearings and appeals system and the judicial indicia that attends it, that the agency is incapable of properly supporting or maintaining such a system in fairness to the claimants and/or the Judges.

The solution, therefore, does not lie within SSA, but in the removal of the Judges from SSA and placing them in a separate unified independent corps such as contemplated by recently proposed legislation for all Administrative Law Judges in government service. Our NCALJ supports such legislation and has published a booklet outlining the advantage of such a solution titled Administrative Law Judges, The Corps Issue, a copy of which is enclosed.

I hope the information contained herein will be useful to you in your pursuit. Thank you again for your interest. If there is any further information you require, please advise me. It is my hope that your review of the matter as Chairman of the House Ways and Means Committee will enable you to support legislation to appropriately solve these problems, whether it be in the nature of a unified corps bill, or other appropriate legislation.

Very respectfully,

Charles N. Bono, Chairman
Health and Benefits Section

CNB:db
Enclosures

P.S. Enclosed is a complimentary copy of Judges, Bureaucrats, and the Question of Independence, referred to in this letter.

cc: Francis J. O'Byrne, Chairman

Judge Leonard Baloun, President
Association of Administrative Law Judges

DEPARTMENT OF HEALTH & HUMAN SERVICES

Memorandum

Date May 19, 1983

From C. J. Occhipinti, ALJ
Eugene Hearing Office

Subject Resignation (Retirement)

Biographical: Private Practice, Member Washington and Alaska Bars; Superior Court Judge May, 1968 to September 1977, Judge Pro Tem, Supreme Court State of Alaska.

To Doris Coonrad, RCALJ
Region X

This is to advise you that as of the close of business on June 10, 1983, I am electing to retire from Federal Service. I had hoped to remain several more years, but find that the changes imposed make it impossible to remain and retain my integrity. Recent administrative policies appear certain to reduce the judicial adjudication of claims to fast track clerical automated justice. Perhaps this should be expected in an era of computer games and declining values. I leave with regret and deep disappointment. My association with the Social Security Administration has spanned almost nine years, and I regret the turn that the Agency has taken. I do have fond memories of professional managers and concerned employees, who showed a sensitivity for people and the law, and managed to violate neither in discharging their duties. The present irresponsible and ruthless demands being made, however, especially in the area of producing "more" without any valid basis or concern as to the reasonableness and legality, has destroyed this feeling which I had for this Agency.

Many of my colleagues have consciously or unconsciously succumbed to the irresponsible demands, possibly in order to preserve their careers, or in some cases, welcoming the reduction in responsibility and effort - - by merely checking boxes and producing the ever-increasing numbers demanded by those blinded by ambition and impervious to truth and honesty. The disability fund is not really in trouble, and the managers can and will make hay with their impressive statistics, pursuing this irresponsible tact until the full impact of poorly adjudicated cases results in a deficit, or is recognized by honest and responsible legislators for the travesty it really is. (My reversal rate is below the national average, and remands of less than two per year indicates some adherence to quality). However, since it is politically expedient at this time, I find that any cry for sanity is ignored and quality will be lost in the maze of management and bureaucracy.

I cannot thus remain associated with this philosophy, as the integrity of the office I hold, as well as my personal values, cannot be diluted, nor will I condone the methods employed to achieve the questionable goals at the expense of deprived litigants, including the raping of the taxpayers in this process. In all honesty, announcement 318, which presumes to recruit ALJs should be abolished, or drastically revised.

Again, with deep regret, and great disappointment, I feel it is time to leave what is a well intentioned program which has surrendered integrity for expediency.

cc: Lou Hays, Assoc. Comm.
Don Sutcliffe, Reg. Comm.

EXHIBIT E

THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

A REPORT

Prepared By The

Subcommittee on Oversight of Government Management

Committee on Governmental Affairs

U.S. Senate

September 1983

United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, D.C. 20510

September 16, 1983

The Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
SD-340
Washington, D.C. 20510

Dear Mr. Chairman:

The Subcommittee on Oversight of Government Management transmits the following report on the role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program.

On June 8, 1983, the Subcommittee held a hearing to investigate allegations that Administrative Law Judges (ALJs) in the Social Security disability program are subject to improper pressure from the Social Security Administration (SSA) to deny more disability cases at an increasingly faster rate. Also investigated were allegations that the SSA is interfering with the decisional independence and impartiality of its ALJs by incorporating internal agency guidelines, the Program Operation Manual Systems (POMS), into Social Security Rulings (SSRs), thereby making the internal agency guidelines binding on the ALJs; and by utilizing the policy of "non-acquiescence" which prohibits ALJs from giving selected federal court decisions precedential weight in the adjudication of disability claims.

The Subcommittee received testimony from the Social Security Administration, the Association of Administrative Law Judges, Inc., individual ALJs, academic scholars in the fields of administrative and constitutional law, and an attorney representing several disabled claimants in a lawsuit against the SSA.

The Subcommittee's principal finding is that the SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program. (The SSA has been successful in its efforts as evidenced by recent statistics showing

a dramatic decline in the ALJ allowance rate in the past year and a half from 67.2 per cent in mid-1982, to 51.9 per cent in June 1983.) The Subcommittee also finds that the SSA is imposing this pressure through several means including the inequitable and unjustified targeting of only allowance decisions and high allowance judges for review pursuant to an amendment sponsored by Senator Henry Bellmon and passed in 1980 (Bellmon Review), and the use of minimum production quotas and productivity goals.

The Subcommittee recommends that:

(1) The SSA immediately discontinue all Bellmon Review activity;

(2) The SSA stop all managerial, administrative, and policy-related activity directly or indirectly aimed at influencing the ALJs' allowance rates;

(3) The Judiciary Committees of the House and/or Senate review the propriety and legality of the SSA's actions regarding ALJ productivity.

The Subcommittee recognizes that although there is a need for the Social Security disability adjudicative process to be uniform and efficient, these goals must not override the obligation to ensure that severely disabled persons receive full, fair, and impartial treatment in the appeals process. The recommendations of the Subcommittee are designed to help ensure that the position and authority of one of the vanguards for such fair treatment, the ALJ, is protected.

Sincerely,

William S. Cohen
Chairman

Carl Levin
Ranking Minority Member

WSC:CL:cvh

V. FINDINGS

The principal finding of the Subcommittee is that the SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program by:

-- focusing its review and study efforts principally on the ALJ allowance rate and ALJs with high allowance rates.
-- increasing the rate at which ALJs are expected to decide cases (the disposition rate), thereby reducing the quantity and quality of time that an ALJ has to devote to each case and lessening the opportunity for an ALJ to develop additional evidence which may support an allowance decision;
-- reinforcing ALJ conduct which reduces allowance rates and increases disposition rates through memos of praise to and within the field offices for such activity;
-- limiting the decisional independence of the ALJs through the use of Social Security Rulings and a policy of selected non-acquiescence in federal court decisions.

Further, the Subcommittee finds that:

-- The SSA views the ALJ allowance rate as the source of the problems in the disability adjudicative process, even though its own initial review in the Bellmon Study has shown otherwise. The SSA has therefore unjustifiably and inequitably focused its efforts on the ALJ allowance rate and ALJs with high allowance rates in such a way as to result in less impartial and fair hearings for some disability claimants.

-- High ALJ allowance rates are only symptomatic of serious inconsistencies and problems in the disability program. The initial review conducted by the SSA as part of the Bellmon Study concluded that the high rate of allowance decisions by ALJs does not necessarily mean that ALJs are acting in error. ALJs are provided with a better opportunity to fairly determine a claimant's eligibility than the state DDS examiners and are entitled to apply different and more flexible standards in the evaluation process, while DDS examiners must work with limited evidence within the confines of strict agency policy and without the benefit of a personal appearance by the claimant.

-- The SSA has established explicit production goals for its ALJs and an implied production quota.

SSA documents show a production goal of 45 case dispositions per month per ALJ by September 1983. And in view of the SSA's actions and comments, it is the Subcommittee's conclusion that an implied minimum quota of 20 case dispositions per month per ALJ is in effect. If an ALJ falls below that level, he or she will be subject to counseling, and if there is no improvement after counseling, it is likely that the SSA will file a complaint for punitive action with the Merit Systems Protection Board.

-- The proposed format for establishing face-to-face evidentiary hearings at reconsideration, if implemented, may undermine the role of the ALJ in the appeals process by reducing the number of claimants who will be willing to pursue an appeal to the ALJ level by creating yet another obstacle for the adjudication weary disabled claimant to overcome, and thereby substituting a review by an SSA employee who will be subject to the direct control and supervision of the SSA, for review by an independent ALJ.

VI. RECOMMENDATIONS

Based on the above findings, the Subcommittee recommends the following:

-- All Bellmon Review activity should be discontinued immediately, and the Bellmon Amendment should be repealed. While the amendment was a worthwhile proposal at the time it was passed, the report issued by the SSA in January, 1982, referred to as "The Bellmon Report" fulfilled the mandates of the amendment. It has given Congress and the SSA valuable information about the nature of the problems in the adjudicative process in the disability program and the reasons for the differences between the decisions of the state disability examiners and the ALJs. The appropriate response now is to legislate reform in the adjudicative process. Continued review of ALJs will serve only as a tool of harassment and undesirable decisionmaking pressure.

-- Any present or future reference, either oral or written, by the SSA as to the desirability of reducing the ALJ allowance rates should be prohibited. Furthermore, while it may be managerially helpful to maintain statistics on the allowance and disposition rates of individual ALJs, the SSA should stop the practice of ranking ALJs on this basis in any internal or external documents.

-- The SSA should immediately discontinue any further

disability evaluation which are to be binding on the ALJs should be made subject to public notice and comment.

-- The SSA should immediately cease its policy of non-acquiescence in decisions issued by Circuit Courts of Appeal. Both of these recommendations are addressed in legislative language in S.476, a bill to reform the continuing disability review process, which was introduced by Senators Levin and Cohen of this Subcommittee earlier this year.

-- The Judiciary Committees of both the House and the Senate should review the propriety and legality of minimal productivity quotas imposed by employer agencies on employee ALJs.

VII. CONCLUSION

The APA mandates that the ALJ be an independent, impartial adjudicator in the administrative process and in so doing separates the adjudicative and prosecutorial functions of an agency. The ALJ is the only impartial, independent adjudicator available to the claimant in the administrative process and the only person who stands between the claimant and the whim of agency bias and policy. If the ALJ is subordinated to the role of a mere employee, an instrument and mouthpiece for the SSA, then we will have returned to the days when the agency was both prosecutor and judge.

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

April 13, 1988

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PAST PRESIDENT

CHARLES N. BOND
Kansas City, MO

Honorable Harley O. Staggers, Jr., MC
1504 Longworth Building
Washington, DC 20515

Dear Congressman Staggers:

Please refer to your letter of March 31, 1988, with reference to Hyatt v. Bowen. The Hyatt order basically provides that claimants of the class who did not exhaust their administrative remedies were to be identified and notified by the Administration. The class involved those Social Security claimants who were denied disability by reason of no end-organ damage resulting from Diabetes Mellitus, Hypertension and an incorrect definition of pain. The policy of the Administration was that of non-acquiescence with the 4th Circuit Court of Appeals law.

Some 77,000 members of the class basically residing in North Carolina have been identified and notified. The Administration must go back to at least September 1981 and readjudicate the cases involving the class members.

It is estimated that 25,000 to 30,000 cases will reach the hearing level before an Administrative Law Judge. Three (3) additional offices will be opened, each containing three hearing rooms and staffed with clericals and staff attorneys, but no Judges, so I am informed. The target date for opening is July 1, 1988. Judges from around the country will be assigned dockets of cases lasting about two weeks. The exact number per docket is variable, but 60 cases is expected. Based on experience, there will be continuances, and it is reasonable to believe a 60-case docket will be reduced to about 56 actual hearings, i.e., 28 per week.

I utilized some figures in rough form, estimating a conservative figure of only 25,000 cases reaching the hearing level, at 28 cases heard per week. (Some cases, although set for hearing, result in no-shows, continuances, postponements, etc.) This will translate into the following workload for traveling judges.

(A) 893 judges going for one week
(B) 447 judges going for about two weeks
(C) 224 judges going for about four weeks
(D) Time factor - hearing rooms available, staffing for visiting judges

Hearing Rooms (weeks/years)

1	2	3	4
893 weeks	447 weeks	297 weeks	224 weeks
17+ years	9+ years	5+ years	4+ years

These would be unadjusted figures, not taking into consideration nine holidays and seasons like Thanksgiving, Christmas, etc.

If only 20,000 cases reach the hearing level at 28 per week, the same would equal 714.3 weeks: (a) 715 judges for one week, (b) 358 judges for about two weeks each, and (c) 179 judges going for about four weeks.

Hearing Rooms (weeks/years)

1	2	3	4
715 weeks	358 weeks	238 weeks	179 weeks
16.5 years	8+ years	5.5 years	4+ years

The bottom line is that it will take three to 17 judge years to hear and decide the cases resulting from Hyatt.

I know I am probably burdening you with figures, so permit me to digress. From the claimant's point of view, there are several logistical problems included, but not limited to the following:

(1) Multiple hearings with same representative being scheduled at the same time.

(2) Exhibit files not being furnished timely for representatives' pre-hearing review and an inadequate time in which to review same.

(3) Inadequate time to supplement the record once pre-hearing review is completed by claimant's representative.

(4) Lost, delayed or misplaced evidence when record is supplemented because of geographic distances and mails.

(5) Continuances as a result of the above, causing still further delays.

(6) General delays.

I am sure better and first-hand information can be obtained from Attorney Edward Ober of Phoenix, Arizona. If you will recall, his prepared statement for the Committee relates the problems occasioned with multiple visiting flying judges.

Back to numbers, Attorney Ober reported (prepared text, page 8; testimony before Sub-Committee) that from May 1986 to February 1988, 31 different judges took 38 trips to the Phoenix, Arizona area and heard 1,060 cases. I projected his figures on three hearing rooms. If you want to, please be my guest.

What, in essence, will take place is the distribution of a 25,000 to 30,000 case backlog in North Carolina - nationwide. So what happens to the judge's docket back home in his regular service area? Plain and simple - further delays, increases in pending cases and processing times of all cases assigned to the Office of Hearings and Appeals. At the present time, there are approximately 650 Administrative Law Judges on duty. I am advised by Former Chief Judge Paul Rosenthal, Office of Hearings and Appeals, that 40 to 45 percent of judges in OHA are eligible to retire currently.

Solution: I wish I could better utter the words of Corps Bill (HR 2726) and the problem would go away. Even if the Corps Bill were passed yesterday and judges were available from other Divisions to help, I doubt if this backlog problem could be handled in less than two years. Additional judges (new hires) maybe. Let's assume 100 additional judges are hired today and are fully capable in 60 days. That would surely put a dent in this backlog, if they were assigned to North Carolina, but they will not be, as other locations around the country are in need of their services.

Retired Judges: Several months ago, after passage of PL 98-224 which amended Section 3323(b) of Title 5 USC which permitted temporary re-employment of retired judges, I looked into the Regulations (Section 930.216) relating to offset of re-employed annuitants (retired judges). I even went so far as to request the Advisory Services Division, Retirement and Insurance Group, Office of Personnel Management, to mathematically compute a hypothetical situation. They did, and when compared to my figures, proved that there is no financial incentive for retired judges to sit pro tem. The offset is too great. Craig Pettibone agreed, in essence, with me.

If you will recall Craig Pettibone, in response to questions, stated that 70 retired judges had expressed an interest in working, but no agency had utilized them. Why? Keep in mind that most of the retired judges came from the Office of Hearings and Appeals and would have experience in hearing and deciding Social Security cases. Possible solution to Hvatt: a temporary waiver, say three years, of the offset provisions of 5 CFR 930.216(K). This could be done on an emergency basis by the Office of Personnel Management or the Congress.

Current Workload: FY 1987, 1986

I am attaching a copy of OHA FACT SHEET FOR FISCAL YEAR 1987. In reviewing the same, you will note that total receipts were up 21 percent (Title II Disability up 16 percent; Title XVI up 29 percent) in spite of an increase in dispositions of 12 percent. Note especially the change in pending, up 26 percent. What will be the impact on these figures because of Hvatt for FY 1988?

Final Figures (Judges/weeks)

Rates of visits (28 per week per ALJ)
Nine satelline hearing rooms = 9 ALJ's per week =

79.36 weeks to handle 20,000
99.22 weeks to handle 25,000
119 weeks to handle 30,000
138.8 weeks to handle 35,000

The above are unadjusted for nine holidays and/or holiday weeks, Christmas week or Thanksgiving week.

Remedies (options)

I am of the opinion that a combination of options could reduce the estimated two and one-half to four years it would take to adjudicate the Hyatt cases. They are: (1) Passage of the Corps Bill (HR 2726) which would enable freeing up judges from independent agencies who have diminished workloads; (2) Hiring retired judges, with waiver of offset; and (3) Hiring 100 additional judges immediately for OHA, 25 of which would be assigned to the three hearing offices in North Carolina.

Sincerely,

Leonard E. Baloun
President

FILED
CHARLOTTE N.C.
APR 14 1989
U.S. DISTRICT COURT
W. DIST. OF N.C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-83-633-M

PATRICK M. HYATT, et al.,

Plaintiffs,

-vs-

LOUIS W. SULLIVAN, M.D.,
Secretary of Health and
Human Services,

Defendant.

ORDER

Counsel for defendant advise that they have given notice of appeal.

Defendant has now moved for a stay, pending that appeal, of the implementation of this court's orders of October 7, 1988, (superseded by the order of October 21, 1988), October 21, 1988, and March 31, 1989. Counsel for defendant advise that they have already obtained an expedited briefing schedule for that appeal.

The Secretary does not meet the classic standards for entitlement to a stay (likelihood of success on the merits; irreparable injury if the stay is denied; lack of harm to other parties if the stay is denied; and public interest).

Nevertheless, this case is important; it involves many thousands of plaintiffs in North Carolina, and potentially the entitlement of millions of plaintiffs all over the country to many billions of dollars.

The source of this court's rulings has, at all times, been not the judgment of this single judge, but controlling decisions of the Fourth Circuit Court of Appeals (affirmed by the Supreme Court of the United States), which this court believes to be correct and has attempted to follow faithfully.

The court will not require defendants to crank up the review and re-evaluation process for all the claims until the issues have been settled by the highest authority that is willing to review the question.

IT IS THEREFORE ORDERED pursuant to Rule 62(c) of the Federal Rules of Civil Procedure that the October 7, 1988, October 21, 1988, and March 31, 1989, orders of this court are STAYED pending disposition of the appeal.

This 14 day of April, 1989.

James B. McMillan
United States District Judge

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to:
S3GJ2

Office of Hearings and Appeals
PO Box 3200
Arlington VA 22203

JUN 15 1989

MEMORANDUM TO: All OHA Field Personnel

FROM : Chief Administrative Law Judge

SUBJECT : Reminders

MEDICARE PART B - ALJ JURISDICTION

We have been asked to remind all OHA field personnel of the types of Medicare Part B cases that all ALJs are authorized to hear, and the types that only designated ALJs are authorized to hear, to avoid situations where ALJs inappropriately dismiss requests for hearings in Medicare Part B cases.

All ALJs are authorized to hear Medicare Part B cases involving beneficiaries who are members of health maintenance organizations (HMOs), and Medicare Part B cases involving the issue of entitlement to Part B benefits (that is, the individual has enrolled in an appropriate enrollment period, is entitled to Part A benefits, is age 65, and is a resident of the United States who is either a citizen or an alien lawfully admitted for permanent residence). All ALJs, however, are not authorized to hear Medicare Part B cases involving the issue of payment of benefits. These cases must be heard by designated ALJs.

Accordingly, if the issue is payment of benefits under Medicare Part B, the HO should send the case to the following address:

Medicare Part B Development Center
P.O. Box 10359
Arlington, VA 22210 - 9998

The Medicare Part B Development Center will forward the case to a designated ALJ for hearing.

UPDATING THE RECORD OF CASES WITH CURRENT EARNINGS RECORD INFORMATION

Effectuating components occasionally cannot effectuate favorable decisions in disability cases because of

information that a claimant has engaged in work activity after the established disability onset date. To avoid these situations, you should update the record of favorable (including partially favorable) decisions with current earnings record information if there is any reason to believe that the most recent earnings information in the file does not accurately reflect all of the claimant's earnings. For example, you should obtain current earnings record information if a claimant states at the hearing that he returned to work after the alleged onset date (AOD), and the most recent earnings record in file does not show earnings after the AOD. The Systems Network Architecture (SNA), provides HOs with the capability to request current earnings record information. For additional information, refer to the SSADARS Query Guide.

AUTOMATED CASE ROUTING SYSTEM AND CASE MAILING

We have been informed that favorable ALJ decisions in Title II cases are frequently being misrouted. This causes inordinate delays in the effectuation of the decisions and the issuance of payments to claimants. To ensure complete accuracy when mailing such decisions and the claims folders, it is important that HOs use the Automated Case Routing System (ACRS) when preparing the form HA-5051, Transmittal of Decision or Dismissal by Administrative Law Judge. As explained in the ACRS Operator Instructions and Training Guide, the form HA-5051 should not be prepared manually except when the Wang DIS system has been down for three or more days. It is also important that HO staffs verify the component addresses listed in their ACRS, and that they doublecheck the addresses on the HA-5051s against the addresses on the envelopes or boxes prior to mailing.

James R. Rucker, Jr.

cc: Eileen Bradley
Associate Commissioner

ANSWERS OF IRWIN W. COLEMAN, JR.,
UNITED STATES ADMINISTRATIVE LAW JUDGE, MOBILE, ALABAMA,
TO QUESTIONS PROPOUNDED BY SENATOR STROM THURMOND,
MEMBER OF THE SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
SENATE JUDICIARY COMMITTEE

1. Agency pressures against Administrative Law Judges in the Social Security Administration exerted to undermine their judicial independence are legion. Congressional hearings in 1975, 1979, 1981, 1982, 1983, 1985, 1988 and 1989 have revealed the long history of Agency "harassment, insult and intimidation." While ALJs are to be secure in pay, promotion, rotation of cases, and tenure under the provisions of the Administrative Procedure Act, the SSA has not been bashful in any of those areas. Social Security has actively opposed all pay raises (other than cost of living) for ALJs in the Social Security Administration for at least the last fourteen years with 100 percent success; it has opposed promotion of from GS-15 to GS-16 for ALJs in SSA and recently forced the resignation of a Chief Judge who recommended the change; it has followed the statutory requirement of assignment of cases by rotation (5 U.S.C., Section 3105) when it suits its purpose, but in regard to Medicare cases appears to be "Judge - shopping;" and it has misused the discipline power (initation of which has been placed in its hands in spite of the fact it is a party to each case decided by its ALJS) to attempt to fire ALJs for what they have written in opinions in cases; for allowing items into evidence in spite of 5 U.S.C., Section 556(c)(3), and for writing his own opinions instead of using a law clerk. In one instance removal proceedings were prosecuted against an ALJ who insisted on personally answering telephone and written Congressional inquiries about his cases. While he was not removed from office, he was suspended from duty for 30 days without pay by The Merit Systems Protection Board and that decision was affirmed by the United States Court of Appeals for the Federal Circuit.

Agency initiatives in those and other areas have been collected by the Association of Administrative Law Judges, Inc. in an exhaustive position paper entitled Statement of the Association of Administrative Law Judges, Inc. To The Disability Advisory Committee (May 1, 1989) detailing the basic reforms necessary within the Agency. A copy of that document has been furnished to the Subcommittee with the answers to Chairman Heflin's questions. S. 594 will accomplish the necessary reform and is preferred since the Association does not believe the Social Security Administration will reform itself.

2. Frankly, I do not see a major problem. I do believe ALJs do possess the significant expertise necessary to render a meaningful decision over such a broad range of potential issues as you posed. One ALJ read the question and said: "One law school teaches all." In practical comparative terms, federal district courts adjudicate the full panoply of federal law and some state law under diversity jurisdiction. The positions are comparable: Butz v. Economou, 438 U. S. 478, 513-514 (1978). In fact, commentators in the legal community believe the selection process for ALJs is, at least, as rigorous as that for district judges and in some ways more so since the political element is minimized or obviated in the former. Moreover, practicing attorneys and those in the United States Attorneys' offices litigate in the full federal spectrum of legal conflict and the theory of the selection process is judges are to reflect the best. Given the number of cases generated in the named agencies in the past, the Division does not appear too broad.

Respectfully submitted,

July 7, 1989

IRWIN W. COLEMAN, JR.
United States Administrative Law Judge

Senator HEFLIN. Judge Heifetz, we are delighted to hear from you now.

STATEMENT OF ALAN W. HEIFETZ

Judge HEIFETZ. Mr. Chairman, on behalf of the Forum of the United States Administrative Law Judges, thank you for the invitation to appear and testify this afternoon. We particularly appreciate your interest in enhancing the independence of administrative law judges and the efficiency of the administrative process. Those are ends with which we most certainly agree.

We are also aware of your efforts and those of your excellent staff to make changes to earlier versions of the corps bill to meet certain objections raised in hearings on those earlier versions.

Nevertheless, and with great respect and appreciation for those efforts, we find that we cannot agree that S. 594 will accomplish its stated ends. Our reasons are detailed in my prepared statement, which I request be incorporated in the record as if read.

At this point in time, I would like to emphasize four points—expertise, efficiency, bureaucracy, and alternatives. Seventy percent of Federal administrative law judges hear and decide cases involving Social Security disability issues. Another 10 percent hear and decide black lung and longshore workers benefits cases for the Department of Labor.

But the remaining 20 percent of Federal administrative law judges with whom my organization is primarily concerned are permanently assigned to hear cases for 26 different agencies and on a case-by-case loan basis for 10 other agencies.

Those 36 departments and agencies want, expect, and are entitled to have their cases decided by administrative law judges with subject matter expertise. To separate those judges from the agencies and to consolidate them into a mere five divisions is to deny those agencies that expertise and to vitiate the doctrine of primary jurisdiction.

As Professor Davis noted in his treatise on administrative law, the rationale for deferring to agency expertise is to ensure that parties who are the subject of agencies' continuous regulation do not become the victims of uncoordinated and conflicting requirements.

The second point I would like to make is that the efficiencies envisioned by the proponents of S. 594 are illusory. For example, an adversarial hearing may involve multiple counsel, parties, witnesses, and spectators, thousands of pages of documents and exhibits, and, of course, a stenographic reporter.

You simply cannot fit that many people, material and equipment in a 150-square-foot hearing facility which was designed to accommodate a disability claimant, who may or may not have a representative, and a judge with a tape recorder. And even if those facilities could be shared, which agency or division would get priority for their use, and by what standards would such decisions be made?

Another efficiency is purported to be combined computer operations for case tracking and monitoring, but we know that one computer does not necessarily speak to another. Computer oper-

ations in different agencies are not uniform as to structure, content, or form, nor should they be, since systems may be designed and programmed to meet particularized needs of program offices and to monitor compliance with statutory deadlines for case processing.

As a matter of fact, the corps, as proposed, would be inefficient. Consider that the Social Security Administration handles 290,000 cases per year, not including remands and reopenings. They are contained in free-floating files which are transferred between central and field offices.

With the advent of a proposed corps, the additional handling of those files would increase their risk of loss, slow the hearing process, and delay benefits to those who cannot afford to wait any longer. Common handling of those files with case files of the 37 other departments and agencies would compound the risk of loss or misfiling.

OPM loan procedures for making ALJ's available to agencies on an "as needed" basis have worked well and would not be improved by S. 594. There have been a few problems, notably, with the Social Security Administration and the Department of Labor, but they really relate to the size of the organization and the difficulty of cutting through multiple layers of judge administrators in order to get cases assigned to an individual judge.

That kind of problem would not be eliminated by the multilayer bureaucracy envisioned in the bill, which brings me to the third point—a bureaucracy of 5,000 employees headed by the most powerful chief judge of any court system now extant.

With 400,000 cases, the chief would be a full-time administrator and not an adjudicator. And with the requirement of a Presidential appointment, the position would attract only the most political of a group which does not belong in a political sphere. Three-quarters of the cases would involve disability or other benefits cases, and the pressure to give those cases priority and personnel would be tremendous.

Finally, I would note there may be an emergency consensus alternative to S. 594 in the form of amendments to it which would attempt to achieve the ends of ensuring independence of ALJ's and creating an efficient administrative hearing system, while at the same time avoiding the objections raised by the numerous opponents of the bill, which include loss of judicial expertise, loss of agency input, and shortcomings in proposed management mechanisms.

An ad hoc group of administrative law judges, including those who were among the architects of the original corps bill and those who have been opposed to it, have been meeting over the last few months. The meetings have been held under the purported auspices of the ABA.

While time hasn't permitted the group to reach a finalized version of those suggested amendments, nor reference of them for approval by the various organizations, I would merely like to list the six specific revisions which would: one, establish a United States corps of administrative law judges under which all judges would be grandfathered; two, establish an Administrative Office of the Corps, which would be modeled on the Administrative Office of the

United States Courts, in order to centrally administer the business of the corps; three, to establish the position of Director of the Administrative Office, who will be the chief administrative officer of the corps, to be appointed by the President; four, to establish a Council of Division Chief Judges to act as the policy advisory body of the corps, modeled on the Judicial Conference of the United States; five, constitute current agency offices of administrative law judges as divisions of the corps which would remain intact within the agencies; and, six, establish a small general jurisdiction division attached to the administrative office to provide judicial services to agencies which do not have their own division of judges and to provide additional judicial resources as and when needed by individual divisions.

I would urge the subcommittee to put off further consideration of S. 594 until the new proposal for amending it has had a chance to garner the support of administrative law judges and agencies which have heretofore eluded it.

Thank you for your time and consideration, and I would be pleased to respond to any questions you might have.

[The prepared statement of Judge Heifetz and answers to questions submitted by Senators Thurmond, Metzenbaum, and Heflin follow:]

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STATEMENT OF
THE FORUM OF
UNITED STATES ADMINISTRATIVE LAW JUDGES

CHIEF JUDGE ALAN W. HEIFETZ

BEFORE THE
SUBCOMMITTEE ON COURTS AND
ADMINISTRATIVE PRACTICE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN OPPOSITION TO
THE ADMINISTRATIVE LAW JUDGE CORPS ACT
(S. 594)

June 13, 1989

STATEMENT OF THE FORUM
OF UNITED STATES ADMINISTRATIVE LAW JUDGES
IN OPPOSITION TO S. 594

Introduction

The Forum of United States Administrative Law Judges is an organization of administrative law judges in approximately 16 federal agencies. Our principal purpose is furtherance of the public interest in improving the administrative process. In our view, creation of a separate unified corps of federal administrative law judges would be inimical to the fair and efficient functioning of administrative proceedings.1/

I. The Provisions of S. 594

S. 594 would place all of some 1000 federal administrative law judges in a new agency designed to hear cases assigned to it by other federal agencies such as those which currently employ administrative law judges. The administrative law judges would be grouped in one of seven divisions, each of which would hear cases in certain legal specialties; assignment of a judge to a specific division would be made "after consideration of the areas of specialization in which the judge has served."

The corps would have a chief judge who would be appointed by the President with the advice and consent of the Senate. Each division would also have a chief judge; the chief judge of the corps and the division chief judges would constitute a Council of the Corps which would be the policymaking body of the agency. The division chief judges would also be appointed by the President with the advice and consent of the Senate.

The Council's authority would include, inter alia, the power to assign judges to divisions and transfer or reassign them from one division to another, to appoint judges, and to prescribe rules of practice and procedure for the conduct of proceedings before the corps, except that the Council could not for two years revise rules that have been prescribed by agencies prior to enactment of either bill without the approval of the affected agency. The Council also would have the authority to file charges seeking adverse actions against administrative law judges.

1/ Although the vast majority of our members are opposed to this bill, a minority of members are in favor of the concept of a unified corps of administrative law judges.

II. The Purported Advantages of a Corps

A. The Actual and Perceived Independence of the Federal Administrative Judiciary

Proponents of a corps argue that placing federal administrative law judges in a separate agency would make them more independent, since they would no longer be employed by the agency which conducts the investigation and prosecution of the cases and would not be housed with other agency personnel. In our view, this argument misconstrues the true nature of judicial independence and addresses a non-existent problem.

The independence of administrative law judges, vis-a-vis the agencies, means freedom to find facts, make a decision based on the judge's best assessment of the record in the light of agency policy, and render decisions without fear of retaliation or discrimination in any form because of the decision reached. The importance of these freedoms is recognized in the Administrative Procedure Act, 5 U.S.C. Sec. 551 et seq., which applies to the vast majority of cases heard by administrative law judges. Thus, the Administrative Procedure Act requires that an administrative law judge may not consult a party on a fact in issue unless all parties are notified and given an opportunity to participate in that discussion, that an administrative law judge may not be responsible to or supervised by someone who performs investigative or prosecutorial functions for an agency, and that any agency employee who is engaged in such functions in any case may not be involved in the agency's decision on review of that case.

Also importantly, the Administrative Procedure Act provides that administrative law judges may be removed only for good cause. Their classifications and pay are established by the Office of Personnel Management and not by the agencies which employ them. In addition, administrative law judges are separated from other agency personnel, are assigned cases in rotation insofar as practicable, and must make their decisions on the record. Further, they may disqualify themselves from cases where they believe they have a potential conflict of interest and are protected from assignment to other agency duties. These aspects of the status of administrative law judges are critical to their independence in making decisions.

Additional protections have been included by Congress in several other enforcement programs. Thus, the National Labor Relations Act requires strict separation between the NLRB General Counsel and the five-member Board, its staff, and the administrative law judges. The National Transportation Safety Board, the Federal Mine Safety and Health Review Commission, and the Occupational Safety and Health Review Commission all have

separate corps of administrative law judges who make final decisions subject only to appellate review by the Commission or Board. With respect to OSHRC and FMSHRC, the review is discretionary. Indeed, an indication of the trust and high regard with which Congress views the administrative law judiciary is that FMSHRC is required to apply the same standard in reviewing its administrative law judges' decisions that the courts traditionally apply to the Commission. Thus, findings by the Commission's trial judges are final and conclusive if supported by substantial evidence.2/

Proponents of a corps refer to the fact that agencies provide administrative law judges with office space and facilities as indicative of the judges' dependence on the agencies. However, the agency personnel who make the decisions regarding these matters report to the agency heads who set the substantive legal precedents which the administrative law judges follow. Just as federal district and appellate court judges do not establish their own budgets and make definitive determinations of what office space and equipment they will use, neither do federal administrative law judges. In both instances, judges are dependent on the decisions of others, whether agency heads or chief judges or Congress, with respect to these aspects of their working conditions.

Proponents also cite the determination of the Social Security Administration to control the volume of decisions and their outcome for the proposition that federal administrative law judges are subject to an inappropriate degree of control by the agencies. However, this is the only example of such a problem mentioned in various statements in support of a corps, and we know of no others with any factual foundation. We submit that legislation fashioned to meet the discrete needs of the Social Security Administration administrative law judges is a more appropriate and measured response to the problem than enactment of legislation that would, with no real justification, completely dissociate all agencies from the administrative law judges who hear cases arising under the statutes those agencies were created to administer.

Proponents of a corps cite a purported perception among litigants that an administrative law judge employed by the agency prosecuting a case cannot be impartial. However, aside from complaints of agency intrusion on the decisional independence of judges at the Social Security Administration, there is no evidence of public, legislative, or judicial concern over the fairness of the administrative process afforded by federal

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2/ Chacon v. Phelps Dodge Corporation, 709 F.2d 86, 90-92 (D.C. Cir. 1983).

agencies. Indeed, in April 1985 the Council of the American Bar Association's Section on Administrative Law passed a resolution opposing establishment of a government-wide corps of administrative law judges. Further, at its 1985 Annual Meeting, the Council of the ABA Section on Labor and Employment Law, a group composed of both management and union labor law practitioners, unanimously passed a resolution opposing establishment of a corps of administrative law judges. While it is true that during this past year the ABA passed a resolution supporting "in principle" legislation to "enhance the judicial independence and efficiency of federal administrative law judges through the establishment of a government wide corps," this resolution does not support S. 594, its precursors or any other specific piece of proposed legislation. Indeed, the Joint Report to the ABA House of Delegates specifically notes that the Administrative Law Section supports enhancement of independence and efficiency of federal administrative law judges, but as to specific legislation, that Section "states only that '(i)f a government-wide corps of ALJs is deemed necessary to effect this result,' (emphasis added) then certain provisions should be included in the legislation." In short, there is still no empirical evidence of any perception of unfairness or partiality beyond complaints against a single program which adjudicates benefits claims.

Decisions of the Supreme Court and the federal courts of appeal have recognized the fairness of the present administrative process and the adequacy of the protections afforded by the Administrative Procedure Act. See, e.g., Butz v. Economou, 438 U.S. 478 (1978); Marshall v. Jerrico, 466 U.S. 238, 250 (1980); NLRB v. Permanent Label Corporation, 657 F.2d 512, 527-528 (3d Cir. 1981); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980); Benton v. United States, 203 Ct. Cl. 263, 488 F.2d 1017 (1973).

B. Efficient Use of Administrative Law Judges

Proponents argue that the establishment of a corps of administrative law judges will result in increased efficiency and flexibility in the assignment of administrative law judges to cases. The grounds for this argument are that: (1) current programs under which administrative law judges are loaned from one agency to another are not successful; and (2) the establishment of a corps of administrative law judges will permit case assignments to be adjusted so as to respond to the various peaks and valleys of individual agency caseloads.

It is frequently less efficient, in terms of achieving initial decisions which reflect an understanding and knowledge of the relevant facts and legal principals at issue, for judges experienced in one area of the law to hear cases in another. The

price of this decreased efficiency is measurable not only in the costs to agencies but in the increased time necessarily spent by attorneys, who must prepare longer and more detailed briefs and arguments to persuade inexperienced judges.

It is true that less complicated administrative proceedings can be efficiently handled by transferred judges. It is also true that some agencies require the services of administrative law judges only sporadically, while others find that temporary decreases in their caseloads enable them to make some of their administrative law judges available to hear other cases. The existing loan program administered by the Office of Administrative Law Judges within the Office of Personnel Management is meeting the needs of agencies in both categories.3/

Indeed, the Office of Administrative Law Judges has revised the procedures for the loan program and is also encouraging agencies to establish standard financial agreements to facilitate the processing of requests for loaned judges. It should also be noted that under recent legislation, the Office of Administrative Law Judges can make retired administrative law judges available to hear cases when needed. We believe that the efforts being made to revise and update the present system are successful, and that there is no need to establish an entirely new bureaucratic structure to facilitate temporary transfers.

As a matter of fact, the creation of an enormous bureaucratic structure would slow the assignment of cases to individual judges and would complicate the appellate process. In essence, implementation of the unified corps concept would be tantamount to a transformation and expansion of the loan program to include all cases now heard before individual agencies. Centralization of docketing, combined with multiple divisions of subject matter, multiple levels of supervision, and multiple field and regional offices, would cause bureaucratic delay, effectively denying expedited hearings to those who challenge agency actions having immediate and severe consequences to them. In large, complex cases, the physical transfer of voluminous dockets with thousands of pages of pleadings, transcripts and exhibits, presents serious possibilities of loss or misfiling of papers once cases are returned to the various departments and agencies during the appellate process.

3/ See 5 C.F.R. Sec. 930.213.

C. Efficient Use of Facilities and Support Personnel

Proponents of the corps concept urge that its establishment would result in significant savings to the taxpayers because it would avoid the necessity of various agencies duplicating each other in the purchase and maintenance of case docketing and tracking systems, the preparation of reports for Congress and the public, and the incurring of expenses associated with employing support personnel. However, the proponents have offered no supporting data for the assertion that establishment of a new federal agency would result in a decrease in the net cost of administrative proceedings at the trial level. Indeed, consideration of the personnel, facility, and equipment requirements of a corps indicates that the contrary may be true.

First, establishment of a corps would entail the transfer to the new agency not only of administrative law judges, but of all support personnel as well. Thus, the new agency would need to be equipped as a full-scale bureaucracy, complete with secretaries, paralegals, clerks, and administrators. There are currently about 1000 administrative law judges; consequently, the total employee complement of the new agency could easily exceed 5,000.

Second, the approximately 650 administrative law judges who hear Social Security Administration cases are dispersed throughout the nation in more than 100 locations. Only a few of the administrative law judges who work for other agencies are located in the same cities. Therefore, the only judges readily available for merger under the same roof and with a single support staff are the approximately 200 administrative law judges located in Washington, D.C. Whether unification of these relatively few administrative law judges would result in any significant savings in the cost of office space, law clerks, libraries, docket clerks, travel offices, and hearing rooms is, at best, a matter of some conjecture.

Third, although there may be some duplication between agencies in the personnel and equipment required to support trial level administrative proceedings, agencies currently pay for some equipment and services which they share with administrative law judges, such as personnel departments, libraries, and travel offices. If the administrative law judges are placed in a separate corps, the new corps will have to supply this support, but, as the agencies will need to maintain their existing services whether the administrative law judges use them or not, the cost to the government of administrative proceedings will increase, not diminish.

D. The Potential for Improving the Quality of Administrative Law Judges

Proponents of S. 594 suggest that if federal administrative law judges are placed in a separate agency, qualified applicants will be attracted by the prospects of more independence and hearing a greater variety of cases. These claims are illusory.

First, this bill would actually diminish the independence of administrative law judges rather than increase it, for it would grant the Council absolute power to transfer nongrandfathered judges from one division to another. Thus, an administrative law judge could readily be transferred against his or her will to hear cases in a field of law in which he or she lacks expertise. Furthermore, the notion that qualified attorneys would be more likely to apply to become administrative law judges if there were a centralized corps does not take into account that many administrative law judges sought the position because it enables them to use the skills and expertise they have developed through years of practicing in a specialized field of law; if there is no assurance of hearing cases in that field, many of these highly qualified practitioners may be dissuaded from becoming administrative law judges.

Further, S. 594 provides that an administrative law judge may be involuntarily reassigned to a new permanent duty station by the Council, subject only to the requirement that the Council give the judge a written explanation that the reassignment is required to meet substantial changes in workloads. In addition, disciplinary actions, including removal, are initiated by this Council. Qualified applicants are not likely to be attracted to positions where there is no guarantee either that they will continue to work in their legal specialty or that they will not be required to uproot themselves and their families against their will.

Last, the purported attraction of hearing a greater variety of cases ignores the policy that certain types of matters should be adjudicated by administrative agencies with particular expertise in the subject matter and the political accountability of their presidential appointees. Thus, this benefit, if it is one, can be achieved only by subverting the administrative process.

III. The Significance of the State Central Panels of Administrative Law Judges

Proponents of S. 594 suggest that the central panels of administrative law judges used in some states constitute a

precedent for establishment of a similar system for federal administrative law judges. However, the comparison is not justified. Those states which adopted central panels previously had no guarantees of independence for administrative law judges comparable to those provided in the federal Administrative Procedure Act, and still fail to provide some of the more fundamental guarantees that exist in the federal system. For example, non-political merit selection, independence from agency advocates, insulation from agency determination of pay and disciplinary matters, and high standards of professional qualification for administrative law judges were not found in these systems before central panels were established (and to some extent not after they were established, either).

The central panels in the states are relatively small, and in most states, despite their characterizations as central panels, do not embrace all of those within the state who perform administrative law judges' functions. In establishing central panels, the states are moving from conditions comparable to those which disappeared at the federal level 40 years ago, and still fail to provide all the protections necessary to guard independence which federal administrative law judges have long enjoyed. In short, one cannot fairly compare a state system with some 20 administrative law judges with the proposed federal corps of 1000 administrative law judges hearing cases arising under the jurisdiction of some 35 departments and agencies.

IV. The Adverse Impact of a Corps on Administrative Proceedings

Establishment of a new federal agency comprising administrative law judges and support personnel is likely to have a substantial and adverse impact on federal administrative proceedings. Agencies which currently utilize administrative law judges are likely to resist creation of a new agency, and there is a possibility that some agencies will choose no longer to use administrative law judges to adjudicate those cases which do not require a hearing on the record under the Administrative Procedure Act. Significantly, S. 594 provides, as discussed above, that the Council shall have the power to prescribe rules of practice and procedure, a provision which nullifies the agencies' long-held authority to prescribe rules and time limitations appropriate for the kinds of cases they are commissioned by Congress to decide. The concept of uniform rules is utopian. Their practical consequence would be to ignore flexible or alternate means of dispute resolution. For example, some statues require the application of federal rules of evidence to administrative adjudications; other do not. If these rules are made uniform, is the corps to override the will of the Congress?

A wide variety of cases arising under numerous statutes are decided in administrative proceedings. The basis for the current system of administrative decision-making is that administrative agencies can develop expertise in a given subject and utilize that expertise in making governmental decisions relating to that subject. Many of the agencies which currently employ administrative law judges have traditionally preferred to hire judges who have had considerable experience in the agency's legal specialty. However, there is no assurance that a corps of administrative law judges would preserve this expertise.

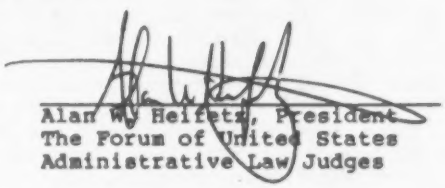
Under the current system, the agency head or his designee controls the agency's case docket, hires administrative law judges in accord with the anticipated caseload, and prescribes rules of procedure tailored to the types of cases which that agency is required to decide. If a corps of administrative law judges is established, however, agencies will necessarily lose all these powers. Many agencies, such as the National Labor Relations Board, the Occupational Safety and Health Review Commission, and the Federal Mine Safety and Health Review Commission, have as a primary function the hearing and deciding of cases arising under a specific statute. A substantial majority of the cases decided by the heads of these agencies come before them on exceptions to administrative law judges' decisions. If the agencies cannot determine how many administrative law judges will be assigned to their cases, they lose a significant part of their power to determine how speedily the statutes they implement will be enforced and to insure the efficiency of their operations.

Each federal agency must presently justify the number of administrative law judges it seeks to employ in light of the mission of the agency and its projected caseload. This is an integral part of the agency's overall planning and budget process. The chief judge of a corps would be in a poor position to speak for other agencies on these matters. Thus, in order to determine staffing and other budgetary requirements of the corps, the chief judge must either engage in ongoing and extensive consultation with some 35 other agencies or act independently without the knowledge to act intelligently. In consequence, the budget process will necessarily become either more complicated or less accurate.

Conclusion

We urge the Subcommittee not to report out S. 594. We recognize that there are serious concerns about the potential for agency intrusion upon the decisional independence of

administrative law judges who hear cases for the Social Security Administration. However, these concerns can readily be met by discrete legislative solutions, without the necessity of establishing a separate agency to house all federal administrative law judges. The other "problems" which such a corps would purportedly address either do not exist, are not likely to be resolved by creating such an agency, or would be substituted by other impediments to the efficiency of the administrative process. The proponents of a corps have the burden of showing that creation of a new agency is needed and will improve the administrative process. They have failed to carry that burden and instead have proposed changes to the present system which would only make administrative adjudication more cumbersome than it is at present.



Alan W. Heifetz, President
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THE FORUM

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June 23, 1989

Honorable Howell T. Heflin
Subcommittee on Courts and
Administrative Practice
Committee on the Judiciary
United States Senate
223 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Heflin:

On behalf of the Forum of United States Administrative Law Judges, I am pleased to submit the enclosed responses to the written questions posed by you and members of your Subcommittee in connection with my testimony on S. 594, The Administrative Law Judge Corps Act.

Sincerely,

Alan W. Heifetz
President

Answers to questions posed by Senator Thurmond.

1. You have asked me to explain what legislative solutions I had in mind when I suggested that specific legislation could resolve concerns about agency intrusion upon the decisional independence of Administrative Law Judges who hear cases for the Social Security Administration.

There are two solutions that I had in mind and which I understand have been proposed by various interests. One proposal would be to take the Social Security Administration out of the Department of Health and Human Services. That would entail setting up a separate adjudicatory agency to resolve benefits cases much in the same way that, for example, the Occupational Safety and Health Review Commission was set up to adjudicate cases forwarded to it by the Department of Labor concerning the results of safety and health inspections performed by the Department's Occupational Safety and Health Administration. A proposal to establish a Health and Human Services Review Commission was first introduced in the Senate during the 98th Congress, 1st Session. I am informed that a similar bill, S. 216, has been introduced by Senator Moynihan. In the House of Representatives, H.R. 791, introduced by Representative Jacobs, would accomplish the same end.

A second proposal which would complement the first is the establishment of an Article I Social Security Court as an adjunct to the Court of Appeals for the Federal Circuit. This would remove appeals of disability cases from the district court.

2. In light of your understanding that ALJs do not establish agency policy, but rather, apply agency regulations to the facts presented in a particular case, you have asked me to comment on the perceived lack of independence among ALJs that some argue hampers justice within the administrative adjudicatory process.

I believe your question raises two issues which should, in turn, be divided into two parts. The first issue is the perception of the adjudicatory process by the public; the second is the perception of that process by ALJs. One distinct part of each issue concerns benefits cases; the other concerns all other administrative adjudication.

The nature of benefits cases gives rise to a dynamic tension between, on the one hand, the adjudication of thousands of cases each year involving the disbursement of public funds, and, on the other, the management of those cases by officials charged with dispensing mass justice and monitoring the level of funds disbursed. At times, management's demand for production has been seen by some ALJs as pressure not only to produce high numbers of case decisions, but also, to deny benefits in those cases in order to preserve the fisc. Management officials, including some

Hearing Office Chief Administrative Law Judges with whom I have conversed, take the position that they are merely attempting to set realistic goals for production of decisions which are correct both in law and in fact. That tension may be able to be alleviated somewhat, but, due to its fundamental nature, I doubt that it can ever be entirely relieved, even if there were to be a unified corps of administrative law judges.

Since there has been no testimony from benefits claimants or their attorneys which bears on their perception of any lack of judicial independence in the adjudicatory process, one cannot conclude that they perceive that there is any such lack.

In regard to the nonbenefits departments and agencies, most members of the public who deal with them understand the decisional independence conferred upon ALJs by the Administrative Procedure Act and the role of ALJs in applying agency policy to individual adjudications. That is why there has been no clarion call for a unified corps of ALJs from those who practice before, are regulated by, or are consumers of products produced by those who are regulated by those various departments and agencies. While there may be a few anecdotal incidents of a perception by those who have appeared before ALJs that they were captive of their agencies, I know of no complaints by ALJs of attempts to compromise their decisional independence.

3. You have asked if I believe there is any demonstrated lack of public confidence in the fairness of the administrative hearing process which would warrant ALJs being separated from the agencies they currently service.

No, I do not believe that there has been such a demonstration. A few anecdotal incidents have been brought to the attention of the Subcommittee by administrative law judges themselves, but, on the other hand, the Department of Justice has described the "evidence" of lack of fairness as "chimerical." I believe that if there were any real concern over lack of fairness, a group like the American Bar Association Section of Labor and Employment Law would not have unanimously passed a resolution at its 1985 Annual Meeting opposing the establishment of a unified corps of administrative law judges. That group is composed of both labor and management representatives, and its members have had a long history of adjudications before the National Labor Relations Board. Moreover, if there were great public concern over a perceived lack of fairness in the administrative adjudicatory process, I am sure that the Subcommittee would have heard from, among others: broadcasters, listeners and viewers; transportation carriers, passengers, shippers and receivers; stock issuers, brokers and holders; bankers and depositers; developers and homebuyers; meatpackers, supermarkets and food shoppers; manufacturers and machine operators; chemical producers and environmentalists; and a host of other regulated industries and consumer groups.

Answers to questions posed by Senator Metzenbaum.

1. You have asked me to summarize a new proposal for amendments to S. 594 and to state who is preparing the proposal and when it will be ready.

Judge Herzel H. E. Plaine, who was designated as the person to present the Joint Report to the House of Delegates of the American Bar Association on the recommendation to support in principle the enactment of a corps of administrative law judges, was the person primarily responsible for assembling an "ad hoc corps committee." That committee has been composed of ALJs who drafted the original corps bill proposal, those who have opposed the bill but who support the corps concept, and those who oppose the bill and the concept but who wish to have their input considered if there is to be any bill. It would take approximately 120 days to complete the draft, circulate it to the various constituencies, and receive their responses.

In general, the revisions to S. 594 would: (1) establish a U.S. Corps of Administrative Law Judges into which all judges would be grandfathered; (2) establish an Administrative Office of the Corps which would be modeled on the Administrative Office of the U.S. Courts to centrally administer the business of the Corps; (3) establish the position of Director of the Administrative Office who will be the chief administrative officer of the Corps and is to be appointed by the President; (4) establish a Council of Division chief judges to act as the policy advisory body of the Corps, modeled on the Judicial Conference of the United States; (5) constitute current agency Offices of Administrative Law Judges as divisions of the Corps which would remain intact within the agencies; and (6) establish a small general jurisdiction division of the Corps, attached to the Administrative Office, to provide judicial services to agencies which do not have their own division of judges and to provide additional judicial resources as and when needed by individual divisions.

2. You have asked what changes I would make to S. 594 and why, assuming the bill is the vehicle used to reform the administrative adjudicative system.

Since neither the general membership nor the executive committee of the Forum have considered any possible amendments to S. 594, I am unable, at this time, to take a position on behalf of the organization as to any possible amendments. However, the executive committee has authorized me to continue to participate in the "ad hoc corps committee" meetings, noted in the answer to your first question, in order to prepare a draft of amendments for submission to the executive committee for its consideration.

I have been participating in those meetings and, from my personal perspective, I believe that the changes noted in my answer to your first question would be those I would recommend, should S. 594 become the vehicle for reform. There are three reasons I would offer in support of those amendments.

First, the legal doctrine of primary jurisdiction recognizes that deference to administrative adjudication is based on agency expertise. Excluding the benefits cases under the jurisdiction of the Departments of Health and Human Services and Labor, there are 36 other departments and agencies which have cases decided by administrative law judges. Under the present version of S. 594, the judges hearing those cases would be consolidated into a mere five divisions. Not only would such consolidation dilute the expertise now available to those agencies, but also it would pit one agency against another in a quest to have cases heard promptly or on a priority basis. On the other hand, leaving ALJs where they are presently assigned would preserve expertise, make available to the agencies a group of adjudicators dedicated to the prompt disposition of their caseloads, and continue reliance on a loan-type program which has successfully been utilized to make ALJs available on a case by case basis to meet contingent needs. Adding a small general jurisdiction division would complement the program by giving agencies the option of not having a dedicated division of judges if their needs require only the assignment of judges on a case by case basis.

Second, leaving judges in the agencies to which they are now assigned would be more efficient than separating them. It would minimize the handling and the need to transfer of hundreds of thousands of files from the agencies to the corps and back again to the agencies. It would eliminate any need to duplicate facilities, equipment and personnel which now are shared by the agencies with their administrative law judges. For example, agencies and ALJs now share personnel and training specialists, budget analysts, financial and accounting managers and examiners, procurement and contract officers, computer specialists and technicians, and administrative and management services personnel. They also share libraries, files and records, computer hardware and software, mail and messenger services, travel offices, health units and storage facilities for equipment, furniture and supplies. The smaller the number of ALJs compared to the total number of agency employees, the greater the unit cost would be to duplicate shared facilities, supplies and personnel.

Finally, eliminating the bureaucracy of 5000 employees headed by the Chief Administrative Law Judge of the United States of America would avoid creation of an adjudicatory mechanism larger than any extant and headed by a Chief Judge more powerful than any now in office. The docket would consist of some 400,000 cases which affect the lives and regulate the corporate existence of those who now come under the jurisdiction of some 38 departments and agencies. The Chief Judge, who would necessarily be an administrator and not an adjudicator, would be a Presidential appointee, and must be chosen from among sitting administrative law judges. This position would attract only the most political of a group which does not belong in a political sphere. If ALJs currently decry invasion of their decisional independence by political interference, there is no reason to believe that their independence would be any greater under an extremely powerful and political Chief Judge who would be under tremendous pressure, at a minimum, to give priority and personnel to particular cases.

Answers to questions posed by Senator Heflin.

1. You have asked whether the testimony before the Subcommittee by representatives of ALJs, the American Bar Association, and the private bar, indicates that there is substantial concern over the perceived fairness of the administrative process.

Although there was no testimony from Social Security claimants or attorneys who represent such claimants evidencing a concern over the perceived fairness of claims adjudication, the testimony by ALJs in the Social Security Administration is evidence that a number of ALJs are substantially concerned over their decisional independence as it is affected by the structure and management of that agency.

The American Bar Association has lately come to support "in principle the enactment of legislation to enhance the judicial independence and efficiency" (emphasis added) of federal administrative law judges through a corps. The joint report to the House of Delegates was sponsored by four of the approximately 25 divisions and sections of the ABA, the Judicial Administration Division taking the lead in sponsoring the recommendation. Membership in the JAD reflects the dominant numbers of ALJs who hear benefits cases coming before the Social Security Administration and the Department of Labor, as opposed to those who hear cases for 26 other agencies. Among them are the most vocal proponents of S. 594. They are substantially concerned with their decisional independence; but their concern is not empirical evidence that there is broad public concern over the perception of the fairness of the system as a whole. As I noted in my testimony, the Labor and Employment Law Section of the ABA unanimously opposed the corps concept in 1985, and even this past year, the Administrative Law Section declined to endorse any specific pending legislation providing for a government-wide corps of ALJs.

While the Subcommittee was provided with some anecdotal incidents which bear on the perception of fairness, there was also the testimony of the Department of Justice which described evidence of lack of fairness as "chimerical." Certainly the Subcommittee did not hear testimony of concern from labor or management; from broadcasters, listeners or viewers; from transportation carriers, passengers, shippers or receivers; from stock issuers, brokers or holders; from bankers or depositors; from developers or homebuyers; from meatpackers, supermarkets or consumers; from manufacturers or employees; or from chemical producers or environmentalists; to name only a portion of those concerned with the administrative process.

The point of our testimony was not that there is no evidence of some concern over judicial independence or the perception of fairness, but rather, that there is no hard evidence which has been presented by the proponents of the corps which would demonstrate that whatever concern there may be, is substantial or widespread.

2. You have asked whether agencies might be able to operate on smaller budgets as a result of agency personnel being transferred to an ALJ Corps.

To the extent that the salaries and expenses of ALJs would be borne by the Corps, the answer is yes, because the agencies would not themselves be paying those salaries and expenses. Of course the public fisc would in no way be affected because those salaries and expenses must be paid one way or another.

To the extent that salaries and expenses of support personnel now dedicated exclusively to the various Offices of Administrative Law Judges would be borne by the Corps, the answer, similarly, is yes. There would be no net affect on the public fisc.

But as to the salaries and expenses of support personnel and the cost of equipment, supplies and space which are shared by Offices of Administrative Law Judges with the various agencies and which are accounted for as common costs, the answer is no. Regardless of the existence of any Corps, and especially in agencies where the proportion of ALJs to the total number of employees is small, agencies would continue to employ personnel and training specialists, budget analysts, financial and accounting managers and examiners, procurement and contracts officers, computer specialists and technicians, and administrative and management services personnel. They would continue to maintain libraries, files and records, computer hardware and software, mail and messenger services, travel offices, health units, and storage facilities for equipment, furniture and supplies. A Corps would need to duplicate such personnel, equipment, supplies and space.

Senator HEFLIN. Would each of you tell us a little about your organization, how many members, whether or not there are any agencies that are excluded or not represented in your organization?

Judge Coleman, would you start?

Judge COLEMAN. The Association of ALJ's draws from the 702 present judges in the Social Security Administration. Our membership there is according to who pays dues promptly, but we run between 300 and 350 members.

Judge MCKENNA. The Federal Administrative Law Judges Conference—the members cross all spectrums—Social Security, all agencies—and we have approximately 300 members.

Judge HEIFETZ. The Forum is composed of administrative law judges from 16 departments and agencies, with the exception of the judges who are members of the Social Security Administration. Our membership also fluctuates as dues are due, and our membership has usually ranged between 80 and 90 members.

Senator HEFLIN. Written questions will be submitted to you, and we appreciate your testimony.

We have letters from the Federal Energy Regulatory Commission, the Federal Administrative Law Judges Conference and the National Labor Relations Board, which we will include in the record as this point.

[The letters referred to follow:]

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

May 23, 1989

Honorable Howell T. Heflin
Subcommittee on Courts and
Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Chairman Heflin:

I wish to advise you and the members of the Committee on the Judiciary of the Federal Energy Regulatory Commission's (FERC) continuing concerns with the concept of a unified corps of administrative law judges and specifically with the provisions of S. 594, the "Administrative Law Judge Corps Act".

S. 594 would create a unified corps of administrative law judges that will hear and render a decision upon every case subject to Section 554 of the Administrative Procedure Act and every case required by law to be held in accordance with Section 554 and Section 556 of the Administrative Procedure Act.

We at FERC have a number of concerns with the concept of a unified corps of administrative law judges. First, it may be helpful to review very briefly the function of the independent regulatory agency and the role played by the agency office of administrative law judges. The independent regulatory agency has been characterized by some as an arm of the Congress performing a delegated function that the Congress could choose to perform itself. In part, at least, that characterization is probably accurate.

In carrying out its duties, the independent regulatory agency has three reasonably distinct missions:

1. Legislative - when it issues franchises or certificates of public convenience and necessity; when it prescribes rules and regulations; and when it prescribes rates.

2. Executive - when it requires reporting by the jurisdictional entities; and when it enforces its rules and regulations.

3. Judicial - When it adjudicates disputes among parties.

The offices of administrative law judges of the various independent regulatory agencies are the trial judiciary of the agencies operating analogously to the United States District Courts in non-jury cases. The administrative law judges perform a delegated function of the independent agency which the agency; that is, its members, could choose to perform. In performing this delegated function the administrative law judges must apply the policies enunciated by the agency and the laws enacted by the Congress, as interpreted by the agency and the courts, to the facts of particular cases. This is an extremely important process because a formal, open, on-the-record hearing followed by a well-reasoned and fair decision makes it far more likely than otherwise that the ultimate decision of the agency, as approved by its members, will also be well-reasoned and fair.

This agency cannot support S. 594. First, most independent regulatory agencies, like the FERC, will be quite hesitant to delegate statutory functions to non-agency employees whose responsiveness they cannot control. Second, the same is true with respect to non-agency employees about whom the agency cannot feel assured there is a high degree of substantive experience in matters of the agency's jurisdiction. Both of these concerns have their basis in a single, fundamental premise: the agencies are clearly accountable, in one way or another, to each of the constitutional branches of government for the performance, or lack thereof, of their statutory responsibilities. The Congress supervises the agencies through substantive legislation, oversight and authorizations, and appropriations; the judiciary through judicial review; and the executive through appointments and various kinds of substantive interventions.

Under the unified administrative law judge corps concept, an agency would have reason to fear a lack of responsiveness to its needs and priorities. It must be remembered that an administrative law judge's independence from the agency is solely decisional, otherwise he or she is bound by the agency's rules. Consequently, the agency sets the priorities in accomplishing its mission -- it can order one case to be heard before another, it can order immediate hearings, it can establish time limits, and the like. To reiterate, agencies would be understandably reluctant to assign cases, many of which are of national or international significance, for hearing before an official who is not accountable to the agency for the timeliness and manner in which he or she decides the agency's case, particularly since the agency will be held accountable for the conduct of such official. This would be specifically true of the FERC where it is necessary on many occasions to order expedited hearings and decisions in order to meet national and international energy emergency situations. The agency would be inclined to lean more and more on deciding cases

by written rulemaking or employee panels. In other words, if the hearing process is to remain a viable method of deciding and disposing of administrative or regulatory proceedings, the agency which is ultimately accountable to Congress in particular must perceive responsiveness on the part of decisional officials to whom decisional acts are delegated. Confidence in such officials is a function of ultimate accountability to the agency. The only accountability provision of S. 594 is section 588, providing for removal and discipline. That provision, however, is so remote from the agency and uncertain of outcome that the necessary accountability is absent from the bill.

Concerns about the responsiveness of administrative law judges under the bill are crucially important to FERC, but they are essentially procedural. At least as important is the related possibility that matters could be referred to administrative law judges who are substantively inexpert in their handling. In this connection, it is useful to take as a model the <u>average</u> administrative law judge. There are some administrative law judges of well above-average ability who would be able to handle complex, arcane and specialized matters of the FERC's jurisdiction, but I am confident that their number is few indeed. The bill recognizes this problem and attempts to deal with it in the limited specialization provisions of section 584. Problematically, that section would bring together in the Division of Communication, Public Utility and Transportation Regulation the work of six major economic regulatory agencies. During the past few years, the FERC has appointed administrative law judges from four of those agencies. It has taken a great deal of time and training for the transferred judges to become proficient in our specialized areas of jurisdiction and an even longer time for those judges to really feel comfortable with their new areas of work. These examples serve to illustrate, I believe, that the work of major economic regulatory agencies is not so similar as to permit easy movement from the subject matter of one to that of another. Even with a specialized division, it must be kept in mind that after a few years the expertise -- gained from assignments in a specialized agency such as the FERC -- of the current judges placed in the various divisions will be lost through attrition. It is very doubtful that a new group of judges with the same expertise can be developed simply because there will be no place to get the necessary experience and training in a particular agency's jurisdiction, policies, etc.

I would like to point out another very important consideration, and that is, in general, the agency adjudication procedures play a very important function in policy making. It is by this route that agency policies frequently are fine-tuned. This is particularly true when the policies must be applied by the judge to factual situations that did not exist and were not anticipated when the policy was formulated. Further, in many instances the agency policy is formulated through the adjudication process. Such

procedures could not be effectively employed where the judge is not an expert in the policy and jurisdictional field of the agency. Certainly, the agency would not be prone to rely upon an individual that it did not observe on a day-to-day basis and who did not have a demonstrated knowledge of the industry regulated by the agency.

I want to say few words concerning the independence of the administrative law judges at the FERC. The FERC administrative law judges enjoy total independence in the conduct of their hearings and in their initial decisions. Neither the Commission nor the Chief Judge discusses or reviews any judge's decision. The Commission and the Chief Judge see the initial decision for the first time when it is released to the public. Further, there is absolute complete separation of the judges from the staff as well as the Commission. While the Commission staff represents a case in each proceeding, its case must sink or swim on its own merits. The judges at FERC, as well as their hearing rooms, library, and the like, are even isolated on a separate floor of the Commission's building. The ex parte rules in dealing with our judges apply to the Commission and the Commission staff as well as to the public.

The foregoing is not in any way intended to be all inclusive of the many problems we foresee would be created should a unified corps of administrative law judges be established by the Congress, but it is sufficient to demonstrate the need for much more study and consideration before such a giant step is taken to change the tried and proven current method of hearing and deciding administrative or regulatory disputes and problems which affect the lives of all the people of this great nation.

It is respectfully requested that a copy of this letter be included in the record of any hearing held on S. 594. In this respect I am enclosing 50 copies of this letter in order that the Committee will have sufficient copies for distribution at the hearing.

If I can be of further assistance to you in this or any other matter, please let me know.

Sincerely,

Curtis L. Wagner, Jr.
Chief Administrative Law Judge

The Federal Administrative Law Judges Conference

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June 6, 1989

Honorable Howell Heflin
United States Senate
728 Hart Building
Washington, D. C. 20510-0101

Dear Senator Heflin:

Thank you for the opportunity you have extended to testify in support of S.594, your bill to establish federal administrative law judges as an independent corps.

We understand that you recently received a letter from the Chief Administrative Law Judge at FERC questioning the wisdom of your proposed legislation.

However, many Chief Judges, including the undersigned, give their wholehearted endorsement to this important legislative change.

S.594 will assure that those who adjudicate cases for federal agencies shall be truly neutral. The bill will result in cost savings, and greater efficiency, and shall make agency adjudications more understandable to the public and the bar.

The oft-expressed concerns that this legislation will diminish Administrative Law Judges' expertise and their responsiveness to agency policy considerations, have been met by various careful revisions contained in the present bill. It provides for judicial training, the assignment of difficult cases to the most experienced judges and the retention of the judges as members of the Executive Branch.

Sincerely,

Parlen McKenna

PARLEN MCKENNA
Chief Judge
Department of Interior

and

Victor W. Palmer

VICTOR W. PALMER
Chief Judge
Department of Agriculture

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

June 12, 1989

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The National Labor Relations Board wishes to express its opposition to S. 594, the Administrative Law Judge Corps Act, which would create a corps of administrative law judges, replacing the present system of judges working for various boards and agencies. The NLRB is one of the agencies that uses a large number of judges. We continue to be of the view that establishment of a centralized corps of administrative law judges would not be in the best interests of the Agency or of the constituencies which the Agency serves.

While we recognize that S. 594, unlike its predecessor bill in the 100th Congress, S. 950, would establish a permanent Division of Labor Relations and would not give the Council discretion to change the divisions established by the bill, we continue to believe that establishment of a corps would be destructive of the efforts of the Board and the American Bar Association's Section on Labor and Employment Law to develop a group of qualified expert NLRB judges, and would undermine the efforts of the Board and the Section to encourage private practitioners with labor law experience to become administrative law judges.

Section 584 provides that initial assignment of judges to divisions at the time the corps begins to operate should be made after consideration of the areas of specialization in which the judge has served. However, section 585 authorizes the Council to assign, transfer, and reassign judges from one division to another without regard to past specialization or the wishes of the judge. Thus, irrespective of the initial arrangement, the Council could transfer judges from the Division of Labor Relations to other divisions and replace them with judges with little or no experience with the National Labor Relations Act. At that point, judges with little or no experience with the NLRA would be hearing NLRB cases, and former NLRB judges would be hearing many cases for

which they have no particular expertise. The non-expert judges would not even be able to achieve special qualifications by intensive on-the-job training, as can be done now with those relatively few judges who come to us without any prior labor law experience. They would undoubtedly take more time to write decisions, thus increasing delays, and because of their inexperience create additional difficulty for attorneys appearing before them and especially for the Board in its review of their decisions. The Board has always, in the majority of its cases, found itself able after thorough review to issue a short-form decision approving the judge's decision. This would be less likely if the Board were to review decisions issued by judges without any expertise. The Board's already difficult workload would be made even more difficult to process within reasonable time limits. In addition, the present Board judges would spend much of their time on non-Board work, using their time to learn new fields, and squandering the expertise they have developed.

Furthermore, the United States Courts of Appeals, which often give deference to Board "expertise," would be less likely to do so if the judges rendering the initial decisions were generalists.

Under the proposed bill, two years after a corps is established, the Council, and not the agencies whose cases the judges hear, could adopt rules and regulations applicable to all hearings before judges. It is true that the proposed bill does not mandate uniform rules of procedure. But the "corps concept" itself suggests that uniformity for the many agencies utilizing the corps would be most probable. Indeed, proponents of the corps visualize it as like the United States District Courts. And they also want the corps to be totally "independent" of the agencies served by it, which militates against separate procedural rules for each agency. Accordingly, we assume that these rules and regulations would have to be sufficiently general to cover proceedings ranging from regulatory, such as licensing and rate making, to enforcement, such as unfair labor and trade practices, and to claims involving the Social Security Act and Black Lung Act, for example. However, elaborate pre-trial discovery and written testimony which may be appropriate for a rulemaking proceeding, may be inappropriate for, and burdensome to, unfair labor practice proceedings. We expect that in consequence these rules will differ substantially from those with which the labor bar is experienced and which have been time-tested and refined. The substitution of an entirely new set of rules general enough to cover all administrative proceedings can only serve to create many issues regarding their implementation, interpretation, and application. The result, of course, will be to unsettle areas now well-settled in practice before the Board.

The Board is also opposed to a loss of control over its own caseload. Under the bill, the NLRB could not be assured of having unfair labor practices heard in a timely manner; that lack of control can only exacerbate delay in the issuing of Board decisions.

One of the principal bases advanced by supporters of a corps is the notion that it would foster a more independent administrative judiciary. However, in the post-Administrative Procedure Act history of the Board, there have been no allegations of agency control over the decisional independence of NLRB judges. If what is meant is to remove Board control over the appointment process (which is already subject to OPM's procedures), that consequence operates as a strong argument against the corps concept.

The National Labor Relations Board is an independent body consisting of five members appointed by the President with the advice and consent of the Senate. The Board sits very much as an appellate court with respect to unfair labor practice cases arising under the National Labor Relations Act. It decides all cases which come before it, but has no role in deciding which cases to prosecute or bring before it. The authority to investigate charges that the Act has been violated and to issue complaints of such violations rests with the General Counsel, an independent officer also directly appointed by the President with the advice and consent of the Senate.

Unfair labor practice cases brought by the General Counsel are tried before Administrative Law Judges. The Administrative Law Judges are appointed by the Board, not the General Counsel, and within the narrow limits provided by the Administrative Procedure Act, are answerable to the Board, not the General Counsel. Thus, the Administrative Law Judges are by law and in fact totally independent of the officer who initiates cases and has taken a position as to how they should be resolved.

The relationship between the Board and the Administrative Law Judges is very much like that between an appellate court and trial courts in any uniform state court system. While the Board, of course, has an interest in seeing that its judges apply precedents and follow announced rules, it has no position with respect to any case when it is before an administrative law judge and no interest in how it is decided. It enters a case for the first time when a case is brought before it on appeal from an administrative law judge's decision. The proponents of the corps can cite no instances of interference with the independence of administrative law judges at the NLRB because the structure of the Board and the Administrative Procedure Act as it presently exists assure their decisional independence.

A second major argument made by proponents is that a corps of administrative law judges will be more efficient than the present system and save the government money because a corps could reallocate judges as fluctuating agency caseloads required and thus reduce the overall number of judges needed. In this regard, we have already noted above that efficiency will be impaired to the extent that judges are assigned to areas outside their expertise and require time to familiarize themselves with the substantial bodies of particularized agency case law.

Further, OPM has administered a loan program over the years which already assists agencies in temporarily reassigning judges as workloads fluctuate. It has been our experience over many years that the loan program does work well, that OPM has streamlined procedures to make its use quick and easy, and that its major drawback comes from the loss of efficiency when judges are assigned to areas outside their expertise, a drawback which would be exacerbated with a corps. We also note that the Board has recently been very active in the loan program and that the arrangements we have currently worked out with other agencies, including the Department of Labor, and the procedures now followed by OPM should serve as models for inter-agency loans in the future.

In sum, we believe that under the present system the decisional independence of administrative law judges is fully protected by the Administrative Procedure Act and provides for efficient and economical utilization of administrative law judges. We believe that there has been no showing of a need for change.

For all these reasons, the Board opposes S. 594.

The Office of Management and Budget advises that there is no objection to the submission of these views to Congress and that the enactment of S.594 would not be in accord with the program of the President.

Sincerely,

/s/

James M. Stephens
Chairman

Senator HEFLIN. We also are pleased to see Judge Mel Cleveland. He will become the president of the Association of Administrative Law Judges in the next day or two, and we welcome you here.

Thank you. We will conclude the hearing.

[Whereupon, at 3:10 p.m., the subcommittee was adjourned.]

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